Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

OFFICE OF THE CLERK

JANE DOE, by and through her guardians Gregory and Michelle Johnson; GREGORY JOHNSON; MICHELLE JOHNSON; JOHN AND JANE DOES, #1-10,

Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, SCDSS; DEBBY THOMPSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court granted the respondent-defendant social worker qualified immunity and dismissed petitioner's 42 U.S.C. § 1983 claims because the district court found social workers had no constitutional duty to protect foster children. The Fourth Circuit affirmed in part, vacated in part, and remanded the matter to the district court. The Fourth Circuit concluded that the district court incorrectly determined that no constitutional duty existed to protect a foster child's substantive due process rights but affirmed qualified immunity, holding that under the second prong of the qualified immunity analysis, the state of applicable Fourth Circuit decisional law was not clear to learned jurists, let alone to social workers not versed in the art of law.

1. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199 – 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1988), did the United States Supreme Court clearly establish a State's "duty to assume some responsibility for [the] safety and well-being" of a foster child who has been taken into custody by the State itself and held involuntarily? See also *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432, (1997) (fn. 7 *DeShaney* "generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody...").

2. Was the social worker's placement of Jane Doe with another child, who the social worker knew

was sexually aggressive, so obviously unconstitutional that *DeShaney*, *Lanier*, and federal and state child abuse statutes gave fair warning that her conduct violated Jane Doe's substantive due process rights? *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

PARTIES TO THE PROCEEDING

Petitioners in this Court, Plaintiff-Appellant below, are Jane Doe, by and through her Guardians, Gregory and Michelle Johnson, Michelle Johnson, Gregory Johnson, and John and Jane Does # 1-10.

Respondents in this Court, Defendants-Appellees below, are the South Carolina Department of Social Services (SCDSS), Debby Thompson, and Directors Elizabeth G. Patterson and Kim S. Aydlette.

Respondents not in this Court but who were parties in proceedings below include Titsa M. Flesch; and Healthy Minds, LLC, a South Carolina Limited Liability Corporation, and numerous unnamed John and Jane Roes.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties to the action in this Court and there are no parent companies or publically held companies owning any corporations' stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jane Doe, by and through her guardians, Gregory and Michelle Johnson, Gregory Johnson, and Michelle Johnson ("Jane") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The order of the United States District Court for the District of South Carolina granting summary judgment to Defendants-Respondents under Rule 56, Fed.R.Civ.P. is unreported. App. 59. The published opinion of the United States Court of Appeals for the Fourth Circuit was issued on March 5, 2010 and is reported at *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163 (4th Cir. 2010). App. 1. Petitioner's petition for rehearing en banc was denied by the Fourth Circuit Court of Appeals on April 2, 2010. App. 57.

JURISDICTION

The United States District Court for the District of South Carolina acquired jurisdiction of this matter through 28 U.S.C. § 1331. The United States Court of Appeals for the Fourth Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291. The Fourth Circuit issued its opinion on March 5, 2010. A timely petition for rehearing en banc was denied on April 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42, Section 1983 creates a cause of action against a state actor who violates someone's civil rights. The statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

The "Due Process Clause" of United States Constitution, Amendment Fourteen, Section 1 bars states from making or enforcing: "any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

South Carolina Code Ann. § 63-7-20(4)(b), formerly § 20-7-490(2)(b), defines child abuse as follows:

> "Child abuse or neglect" or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare...(b)

> commits or allows to be committed against the child a sexual offense as defined by the laws of this State or engages in acts or omissions that present a substantial risk that a sexual offense as defined in the laws of this State would be committed against the child.

Such child abuse has been criminalized by the legislature of South Carolina and specific statutes can be found at S.C. Code Ann. § 16-3-95 as follows:

> (A) It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.
> (B) It is unlawful for a child's parent or guardian, person with whom the child's parent or guardian is cohabitating, or any other person responsible for a child's welfare as defined in Section 63-7-20 knowingly to allow another person to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than five years.
> (C) For purposes of this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

and at S.C. Code Ann. § 63-5-70:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.
>
> (B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

On August 9, 1999, the South Carolina Department of Social Services (SCDSS) received a report that four-year-old Jane Doe and her eight-year-old brother, Kameron Cox, were victims of sexual abuse. App. 3. SCDSS officials took the children into emergency protective custody. App. 3.

Jane reported that she was sexually abused by her mother's boyfriend, maternal grandfather, and her eight-year-old brother, Kameron. Jane's mother denied abuse but reported that "Kameron had played with [Jane]'s private but she told him not to do it anymore." App. 4. Kameron first admitted the abuse and then he denied sexually abusing his sister.

The sexual abuse assessments and medical examinations were inconclusive as to whether the children had been sexually abused. App. 4. Nonetheless, Joy Bennett, the children's therapist, warned SCDSS that the children should "receive a high degree of supervision when alone to prevent any abuse to [Jane Doe] by Kameron." Later, the South Carolina Family Court found physical neglect and granted SCDSS temporary custody of the children. App. 4.

Physical custody, but not legal custody, was transferred to a relative placement and the children spent the next year with their maternal aunt. App. 4. Physical custody was returned to SCDSS in July 2000 and the children were placed in a group home by SCDSS. App. 4. During September 2000 the children were moved to their first foster home by SCDSS. App. 4.

On May 30, 2001, SCDSS assigned the defendant Debby Thompson as the Adoption Specialist for Jane Doe and her brother, Kameron. App. 5.

On June 18, 2001, Bennett reported that Kameron had become increasingly angry and depressed at his inability to return to his mother's home. App. 4. She stated that he posed a threat to himself and to Jane, and she recommended psychiatric hospitalization. App. 4. She also recommended that although it would be beneficial to Kameron if the children stayed together, this should only happen "if this c[ould] be done safely" for Jane. App. 4.

Kameron's psychiatric records from the ensuing hospitalization showed that Kameron suffered from depression, suicidal and homicidal thoughts, and had become increasingly aggressive and hostile towards Jane. App. 4. The same records showed Kameron blamed Jane for their placement into foster care "because she made statements that [their] mother, stepfather, and maternal grandfather [had] sexually molested her," but Kameron "d[id] not believe her allegations." App. 4. The psychiatric records also stated that there was a history of sexual experimentation by Kameron and Jane with each other, possible sexual abuse of the children, and possible intergenerational incest. App. 4 – 5.

Kameron was discharged from the hospital on July 5, 2001 and placed in a foster home separate from Jane. App. 5. This was the first time the children had ever been separated from each other. Thompson began visiting the children later that month, but Kameron's threats to Jane caused SCDSS to postpone efforts for a joint adoption of the siblings "until a determination of the appropriateness of an adoptive placement of [Jane] and Kameron together c[ould] be made." App. 5.

Bennett later advised Thompson in a letter dated August 22, 2001 that Kameron "ha[d] been a danger to [Jane] and she should be protected," but that Bennett had "realistic hope that Kameron c[ould] deal with his emotions and be safely reunited with her." App. 5. It is some question as to how realistic that hope was, especially after Bennett noted in the same letter that Jane "show[ed] some signs of sexual abuse including . . . a history of trying

to sneak into Kameron's bed, probably for comfort through sexual contact." App. 5. Bennett also wrote to Thompson that, "It is unclear what the exact history of sexual abuse is for [Jane Doe] and Kameron, but it is very likely that they have engaged in inappropriate sexual encounters with adults and with each other." App. 5. During this period, Jane also began to exhibit acting-out behaviors of a sexual nature, including overly affectionate behavior towards boys and men as well as anger and aggressiveness when she was frustrated. App. 5. Jane Doe also inappropriately touched a much younger child in her foster home.

On November 14, 2001 Bennett wrote to David Barnes, another social worker for Jane Doe, that, "[Jane Doe] seems to have been socialized to base relationships with other children on sexual behavior. To her, sex is a way you show sibling love."

On November 26, 2001, Jane was placed in therapeutic foster care with Bill and Pam Hamerick, where she could be seen by Kameron's therapist, Titsa M. Flesch, and have the feasibility of reuniting the children evaluated. App. 5 – 6. Flesch was never advised that Kameron sexually abused his sister and that Joy Bennett had concerns for Jane's safety. During this time Jane had sibling visits with Kameron, including some overnight visits on weekends and holidays. App. 6.

On September 9, 2002, Kameron was placed in the Hamericks' home upon the advice of the children's therapist Titsa M. Flesch. App. 6. Again,

the children's new therapist was unaware of the scope and frequency of sexual abuse perpetrated upon Jane Doe by Kameron. There were no documents or notes in Flesch's records that show SCDSS or Thompson warned the counselor that Kameron had sexually abused his sister.

SCDSS had also filed an action in family court seeking to terminate the parental rights of the biological parents, in order to pursue a joint adoption of the siblings. App. 6. Following a contested proceeding, the mother voluntarily relinquished her parental rights, and the parental rights of the father were judicially terminated. App. 6. The family court granted:

> "[c]ustody of the minor children . . . to [SCDSS] with all rights of guardianship, placement, care and supervision, including the authority to approve medical treatment or educational plans, to secure placement for the minor children and the sole authority to consent to any adoption, with the authority to seek such routine and emergency medical care as [SCDSS] deems necessary and in the best interests of said minor children." App. 6.

Plaintiffs Gregory and Michelle Johnson applied to adopt a child or children in May 2002. App. 6. In January 2003, Thompson presented a background summary on Kameron and Jane to the Johnsons. App. 6. Thompson claims that the summary contained all of the information available to her about the children, including the allegations that they had been sexually abused. App. 6 – 7. The

Johnsons assert that the summary minimizes any abuse and, although Thompson was aware of the scope and frequency of the abuse, Thompson's words and actions convinced the Johnsons that no "physical" sexual abuse occurred. Thompson had reviewed all of the children's records, hospital and psychiatric records, and all documents and correspondence related to the two children.

The summary stated that the children had been removed from the birth home for allegations of sexual abuse but that Jane had been inconsistent in her reports of abuse, alternately naming her birth mother, Kameron, her maternal grandfather, and her mother's boyfriend as having been sexually inappropriate or abusive toward her. App. 7. The summary also states Kameron had been inconsistent at times, both denying and admitting inappropriate contact with his mother. App. 7. He denied knowledge of any inappropriate contact between Jane and the adults. App. 7. In the end, the Johnsons were advised that SCDSS had been unable to substantiate or rule out sexual abuse of either child. App. 7. The summary represented that "[t]here ha[d] been no reports of any sexually inappropriate behavior from Kameron *since* entering care" and that "[p]art of his therapy ha[d] been to insure that he understands boundaries, good touch-bad touch rules and appropriate social interactions." App. 7 (emphasis added). This last claim is directly contradicted by the record and the documents Thompson expressly claimed she reviewed.

The Johnsons assert that Thompson orally represented that the children were not sexually

abused. Thompson told the Johnsons that the abuse allegations were just allegations and there was no evidence to support the allegations. Thompson explained to the Johnsons that sexual abuse was not always physical and could be inappropriate behavior seen by children, and pornographic videos and material. Thompson explained that sexual abuse was not always penetration and could be just fondling.

On February 28, 2003, Jane and Kameron were placed in the Johnsons' home in anticipation of adoption. App. 7. Kameron was removed from the Johnsons' home four weeks after the placement because he inappropriately touched the Johnsons' biological son. App. 7. Jane remained with the Johnsons and her adoption was finalized on November 6, 2003. App. 7.

One year later, while Kameron was living at a wilderness camp, Kameron disclosed that he had sexually abused Jane prior to SCDSS's removal of them from the birth home. App. 8. Kameron also claimed to have sexually abused seven foster children while in foster care. App. 8. This sexual abuse ocurred both before and after his placement with the Johnsons. App. 8. Kameron's social worker notified the Johnsons that Kameron had claimed to have had an inappropriate sexual relationship with Jane prior to SCDSS's taking custody of them, but Jane told her therapist "that Kameron was lying and that they were still having 'sex' until they moved in with [the Johnsons]." App. 8. Jane also claimed that she told Thompson and Flesch that Kameron had sexually abused her while she was with the

Hamericks and at other foster homes that she could not recall. App. 8.

Jane may be confused between her first counselor, Joy Bennett, to whom she disclosed sex abuse, and her second counselor, Titsa Flesch, who was unaware of the amount and duration of sex abuse and who did not probe into this subject matter with the children. According to Jane, Thompson "told her not to tell anyone or they would never adopt her." App. 8. Thompson has denied that Jane made any such report to her. App. 8. Thompson claimed that she received no reports of any inappropriate behavior or contact between Jane and Kameron occurring during her relationship with Jane, and represents that she never observed any behavior which would have led her to believe that Jane and Kameron were having sexual or other inappropriate contact at that time. App. 8.

The Johnsons filed suit on their own behalf, and as parents and guardians of Jane, against Thompson. App. 9. Among their claims, the Johnsons alleged under § 1983 that Thompson violated Jane's substantive due process rights under the Fourteenth Amendment by placing her in foster care settings with Kameron knowing that Kameron was sexually abusive toward Jane.

The Johnsons' claims were dismissed by the United States District Court for the District of South Carolina upon the State's motion for summary judgment. Fed. R. Civ. P. 56. App. 59. The district court concluded that foster children who were in the custody of the state were afforded no substantive due

process rights under any circumstances. App. 66 – 67.

The Johnsons applied for relief to the United States Court of Appeals for the Fourth Circuit. App. 10. The Richmond Court affirmed in part, vacated in part, and remanded in part. App. 34. The Fourth Circuit, with Chief Judge Traxler writing for the majority, held that "when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing 'some responsibility for [the child's] safety and general well-being.' *DeShaney*, 489 U.S. at 200. Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security." App. 24 – 25.

The determination that Thompson should received qualified immunity on the substantive due process claim for lack of fair notice is the only issue for which Petitioners seek review. *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Involves the Important Question of Whether Foster Children in the Custody of the State Receive Substantive Due Process Protections.

According to the Administration for Children and Families of the United States Department of Health and Human Services, "there were approximately 463,000 children in the U. S. in foster care on September 30, 2008." See AFCARS Report – Preliminary FY 2008 Estimates as of October 2009, U.S. Dept. of Health and Human Servs., Admin. for Children and Fam., http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm (last accessed June 29, 2010).

In comparison, state and federal prison authorities had jurisdiction over 1,610,446 prisoners at midyear 2008: 1,409,166 in state jurisdiction and 201,280 in federal jurisdiction. Local jails held 785,556 persons awaiting trial or serving a sentence. See Total correctional population, Bureau of Justice Statistics, U.S. Dept. of Justice, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11 (last accessed June 29, 2010).

Petitioners ask the Court to reaffirm the principles laid out in *DeShaney* and hold that Thompson had fair notice that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to

provide for his basic human needs -- *e.g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by...the Due Process Clause." *DeShaney* 489 at 199 – 200. These are the same protections afforded to prisoners and the mentally infirm.

The news is awash with articles regarding actual or proposed spending cuts in the social services sector. Within this sea of numbers are a half million children in the custody of the states. Unlike prisoners, children cannot hire lawyers, file pro se complaints, or assert their civil rights. Foster children have no voice, no vote, and no money to provide the influence to move our executive or legislature to provide them the necessary protections and minimal safety. As soon as foster children enter the system their records are kept confidential and sealed in the family courts.[1] They are isolated from all but their social workers and foster parents.

When social workers fail their charges, foster children lack champions and protectors. Often their natural protectors – their parents – have failed the children due to abuse, neglect, or illness and, rightly, they are no longer in the picture.

There is no check on bad conduct and often a 42 U.S.C. § 1983 claim is one of the few vehicles to

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[1] Under the Child Abuse Prevention and Treatment Act (CAPTA), in order to receive a Federal grant, States must preserve the confidentiality of all child abuse and neglect reports and records to protect the privacy rights of the child and of the child's parents or guardians except in certain limited circumstances. 42 U.S.C.A. § 5106a(b)(2)(A)(v) (West Supp. 1998).

institute real change, correct an injustice or harm, and assign accountability.

It is quite simple to turn these children into Ford Pintos. If a child has a history of sexually abusing other children he or she should be placed in a high management therapeutic foster home or institution. A basic group home may cost $1,000.00 to $3,000.00 a month. A high management therapeutic foster home or institution for children who sexually abuse other children can range from $5,000.00 to $15,000.00 a month. A social services agency can save anywhere from $2,000.00 to $14,000.00 a month by placing the child in a regular foster home. A cost savings of up to $250,000.00 can be realized for just one child in as little as eighteen months as long as the child's special needs are not met.

Unfortunately, these possible immediate savings can and do exponentially multiply the future costs to the same social services agency, our mental health services, and our corrections systems because the original "broken" children who are exposed to mainstream children "break" these other children and they are released into our society.

While petitioners assert that *DeShaney* clearly delineated substantive due process protections for foster children, the Fourth Circuit has disagreed with petitioners. Petitioners assert that for decades our nation's criminals and mentally ill have received substantive due process protections enumerated by our highest Court. Petitioners ask this Court to make certain that our most innocent

and helpless citizens who are in the custody of the fifty states have the same protections as prisoners and the mentally ill for their basic human needs – food, clothing, shelter, medical care, and reasonable safety.

II. The Circuit Split Is Real, Extensive, and Expressly Acknowledged in Several Opinions of the Courts Below.

As noted in *DeShaney*, the Courts of Appeals for the Second Circuit and Eleventh Circuit had previously held that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment. *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-142 (2d Cir. 1981), *after remand*, 709 F.2d 782, *cert. denied sub nom., Catholic Home Bureau* v. *Doe*, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983) and *Taylor ex rel. Walker* v. *Ledbetter*, 818 F.2d 791, 794-797 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989).

The Sixth Circuit held in 1990 that substantive "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes" where the complaint alleged that the state officials "were 'deliberately indifferent' to reports of abuse" in the foster home. *Meador v. Cabinet of Human Resources*, 902 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 867, 111 S. Ct. 182, 112 L. Ed. 2d 145 (1990).

In *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883 (10th Cir. 1992), the Tenth

Circuit held that "children in the custody of a state ha[ve] a constitutional right to be reasonably safe from harm" and "if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs.")

The Eighth Circuit took the position that "[a] special custodial relationship . . . was created by the state when it took [a child] from his caregiver and placed him in foster care" where the "child los[t] his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs." *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993)

In 1997 the Seventh Circuit held that "[O]nce the State removes a child from her natural parents, it assumes at least a rudimentary duty of safekeeping. It cannot place a child in custody with foster parents it knows are incompetent or dangerous." *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997)

In 2000 the Third Circuit followed *DeShaney's* holding that foster children enjoy substantive due process protections while in the custody of the state in *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (en banc) (We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties [wherein] the failure to perform such duties can give rise...to liability under section 1983).

In 2003 the United States Court of Appeals for the Federal Circuit held that, "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the . . . Due Process Clause. *Smith v. District of Columbia*, 413 F.3d 86 (D.C. Cir. 2005) (quoting *DeShaney* 489 at 199 – 200.)

Most recently, the Fourth Circuit held "that when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing "some responsibility for [the child's] safety and general well-being." *DeShaney*, 489 U.S. at 200. Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security." *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163 (4th Cir. 2010).

The First Circuit has failed to recognize substantive due process protections for foster children as recently as January 27, 2010. *J.R. v. Gloria*, 593 F.3d 73 (1st Cir. 2010) ("As a general matter, a State's failure to protect an individual

against private violence simply does not constitute a violation of the Due Process Clause, unless the government is responsible for the deprivation.")

The Fifth Circuit discussed a foster child's substantive due process right and recognized such a right using the *Hope v. Pelzer* analyses wherein a constitutional violation need not be delineated by prior decisional law that holds the very action in question has previously been held unlawful. *Hernandez v. Texas Dept. of Protective and Regulatory Services*, 380 F.3d 872 (5th Cir. 2004). Citing *Hope v. Pelzer*, 536 U.S. 730, 738, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002) the Fifth Circuit held that in light of pre-existing decisional law, *Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994), the unlawfulness of the acts were apparent in that the social workers were indifferent to a child who was abused while in the state's custody.

In 2008 the Ninth Circuit held, in an unpublished opinion, that although a child has a right to safety within a foster care setting to include adequate shelter and food and to be free of abuse at the hands of others as stated in *DeShaney*, the Court did not go so far as to ferret out a foster child's protections in a § 1983 context. *Miller v. Gammie*, 267 Fed. Appx. 697 (9th Cir. 2008). The Ninth Circuit chose "not to decide the issue" when it designated the opinion to be unpublished.

The circuit split is thus: substantive due process rights are recognized in the foster care setting in the Second, Third, Fourth, Sixth, Seventh,

Eighth, Tenth, Eleventh, and the Federal Circuit Court of Appeals. These same rights are either not recognized or are confused despite the Court's clear holding in DeShaney in the First, Fifth, and the Ninth Circuits.

III. The Decision Below Ignores This Court's Decision in *DeShaney*.

On February 22, 1989, six years before Jane Doe was born, the Supreme Court of the United States issued *DeShaney v. Winnebago County Department of Social Services*. In *DeShaney*, the Court clearly established a State's "duty to assume some responsibility for [the] safety and well being" of a person who has been taken into custody by the State itself and held involuntarily. *DeShaney*, 489 U.S. at 199 – 200.

The Court reasoned that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions." *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), *quoted in DeShaney*, 489 U.S. at 199 (bracketed phrase added by the Court in *DeShaney*).

Since 1987 the contours of the constitutional violation has been defined as,

> "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself,

> and at the same time fails to provide for his basic human needs -- *e. g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the...Due Process Clause." *DeShaney*, 489 at 200, citing *Estelle* v. *Gamble,* 429 U.S. 97, 103-104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Youngberg* v. *Romeo,* 457 at 315 – 316.

This Court provided notice to all state actors that when they take a person into involuntary custody, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 at 200, citing *Estelle* v. *Gamble,* 429 at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"). The Court further advised that [i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney*, 489 at 200.

DeShaney clearly defined the constitutional violation; (1) custody, (2) knowledge of a danger, and creation of the danger or rendering the ward more vulnerable to the danger. In this instance the state

had (1) permanent and sole custody of Jane Doe, (2) knowledge that Kameron was sexually abusing Jane while in foster care, and (3) Thompson placed Jane and Kameron back together after she had been warned that Kameron had sexually abused Jane and that he posed a threat to her. Thompson's actions were grossly reckless, intentionally evil, and they shock the conscious. After the children were moved to new homes and a new counselor Thompson was the sole custodian of the fact that Jane had been raped by Kameron. By severing Jane Doe's ties to her parents and by not informing Jane Doe's caregivers Thompson and the state imposed a limitation on Jane's freedom to protect herself or have a caregiver protect her.

This Court restated *DeShaney's* holding in *United States v. Lanier* in 1997 where *DeShaney* "generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody..." *Lanier*, 520 at 272. In this instance, Thompson was never required to make any guesses in gray areas. *Anderson v. Creighton,* 483 U.S. 635, 639-40, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

Previous Fourth Circuit decisions addressing abuses in the foster care system are distinct from *DeShaney* and do not cause confusion for state actors who look to decisional law to receive fair notice of possible constitutional violations under § 1983.

The first case, *Milburn v. Anne Arundel County Dep't of Social Services*, 871 F.2d 474 (4th Cir. 1989), is distinguishable because Charles

Milburn, the foster child, was voluntarily placed into the custody of the state. Additionally, the state did nothing to make the child more vulnerable to the harm he faced.

In *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990), Clifton Weller was placed in the custody of his mother and grandmother where he was abused. These facts fit squarely in the factual scenario of *DeShaney*. The *DeShaney* Court denied recovery when a child was harmed at home by a family member and no plaintiff could reasonably expect to recover in such a scenario.

Finally, in *White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997) the Court denied relief because the social workers were completely unaware of any physical abuse endured by Keena White before she was beaten to death.

Custody is dispositive in this matter and in *DeShaney*. In the three other occasions wherein the Fourth Circuit reviewed § 1983 matters, the children were all in the temporary custody of the state and/or they were voluntarily placed in the custody of the state by their parent(s). Jane Doe's parents had their parental rights terminated in an adversarial proceeding initiated by the state. Jane Doe was a ward of the state and she had no other parent but the State of South Carolina.

DeShaney holds that Jane Doe, born six years after *DeShaney* was entered, came to us shrouded in the constitutional right to have her basic needs, including "reasonable safety," protected by the state

when her own freedom was limited through the affirmative acts of the state that involuntarily placed her in the state's custody. *DeShaney's* holding forecloses the Fourth Circuit majority's holding that the rights in question -- Jane Doe's rights to be reasonably safe from rape and sexual abuse while in the custody of the state, were not clearly established at the time the social worker was deliberately indifferent to Jane Doe's rape and sexual abuse. App. 24. Even more so, the concurrence by Judge Wilkinson should be disregarded by the Court wherein Judge Wilkinson claims the majority fashioned "new substantive due process right[s]" for Jane Doe as these rights were. App. 37.

IV. The Decision Below Ignores the Obviously Unconstitutional Actions of Thompson.

Petitioners also assert that Thompson's prior knowledge that Jane Doe was being sexually abused by Kameron coupled with the deliberately indifferent acts of placing Jane Doe and Kameron together in foster care and pre-adoptive placements were so obviously unconstitutional that prior decisional law set on the same set of facts were unnecessary for Thompson to understand that what she was doing was legally and constitutionally wrong and morally bankrupt.

General statements of law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question,

even though "the very action in question has [not] previously been held unlawful, "*United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Writing for a unanimous Court, Justice Souter quoted Judge Daughtrey of the Sixth Circuit: "'the easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996).

This Court has held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). Petitioners assert that if the Court does not believe Jane Doe's predicament was expressly addressed by *DeShaney* at 199 – 200, Thompson did not need legal training to discern that when she was responsible for a ward of the state she was also responsible for her reasonable safety. The contours of the constitutional violation are delineated in *DeShaney*, *Farmer v. Brennan*, *Estelle v. Gamble*, and *Youngberg v. Romeo* and no legal expertise is needed in divining their comparable message. It is not unreasonable or unfair to state that social workers were given fair notice that when a ward is restrained and taken into the custody of the state then the social workers must provide for basic human needs – to include reasonable safety.

Thompson's actions, when viewed from the perspective of a reasonable social worker under the

same circumstances, were not reasonable and are not tolerable under any circumstances. There were no gray areas or moments of split second decision making for Thompson to consider any other alternative. Not only were Thompson's actions unreasonable, are devoid of common sense.

V. The Issue Presented in This Case Will Arise Often, Given Large Number of American Children Who Live in State Custody and Foster Care.

Close to a half million children in the custody of the various states' foster care systems on any given day that are lost to the rest of society as a whole. Almost each and every child protection case is shrouded in court ordered privacy. Often the only persons who are aware of systemic failures in the protection of foster children are the social workers who may be liable for the failures, the foster parents who may have caused the failures, and the children who lack a voice and the sophistication to use their voice.

Prisoners and mentally challenged persons that are in the custody of the state often have a voice, access to courts, and family and friends on the outside who know where they are being held and for how long they are being held. Foster children lack these tools. 42 U.S.C. § 1983 provides a sword to right injustices for these children and a shield to prevent future harm to children that enter the system at a later time.

CONCLUSION

Judge Wilkinson, the author of the concurring opinion in this matter, recently wrote in *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 182 (4th Cir. 2009):

> All civilizations will be measured in the fullness of time. Perhaps fine art, great invention, sustained prosperity, or enhanced longevity mark the quality of civilized life. Perhaps, I say, because there must be something more. How a society treats its most vulnerable members may do more than grandiosity to shape its lasting worth.

Certainly this is an opportunity for the Court to reiterate the basic rights clearly delineated in *DeShaney* that protect the most vulnerable and innocent members in our society.

WHEREFORE, the undersigned asks that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully Submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANE DOE, by and through her guardians Gregory and Michelle Johnson; GREGORY JOHNSON; MICHELLE JOHNSON; JOHN AND JANE DOES, #1-10,

Plaintiffs-Appellants,

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, SCDSS; DEBBY THOMPSON; ELIZABETH G. PATTERSON, Director; KIM S. AYDLETTE, Director,

Defendants-Appellees,

and

KAMERON SETH COX; TITSA M. FLESCH; HEALTHY MINDS, LLC; JOHN AND JANE ROES, #1-10; MANAGERIAL ROES, #1-10; SUPERVISORY ROES, #1-10; CASEWORKER ROES, #1-10; FOSTER PARENT ROES, #1-10,

Defendants.

No. 08-2161

Appeal from the United States District Court
For the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.
(3:06-cv-03663-JFA; 3:07-cv-01629-JFA)

Argued: October 15, 2009.

Argued: October 15, 2009.

Before TRAXLER, Chief Judge, WILKINSON, Circuit Judge, and HAMILTON, Senior Circuit Judge

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Affirmed in part, vacated in part, and remanded by published opinion. Chief Judge Traxler wrote the majority opinion, in which Senior Judge Hamilton joined. Judge Wilkinson wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Robert James Butcher, CAMDEN LAW FIRM, PA, Camden, South Carolina, for Appellants. Andrew Linde-mann, DAVIDSON & LINDEMANN, PA, Columbia, South Carolina, for Appellees. **ON BRIEF:** William H. Davidson, II, Katy A. Rice, DAVIDSON & LINDEMANN, PA, Columbia, South Carolina, for Appellees.

OPINION

TRAXLER, Chief Judge:

Jane Doe, a minor child, and her adoptive parents, Gregory and Michelle Johnson, brought this action under 42 U.S.C.A. § 1983 (West 2003), against Debby Thompson ("Thompson"), an Adoption Specialist with the South Carolina Department of Social Services ("SCDSS"), alleging violations of their substantive due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs brought additional state law claims against SCDSS under the South Carolina Tort Claims Act ("SCTCA"), *see* S.C. Code Ann. §§ 15-78-10 to 15-78-220 (1976), alleging gross negligence on the part of SCDSS and its employees. The district court granted summary judgment on the § 1983 claims in favor of Thompson based upon qualified immunity, and summary judgment to SCDSS based upon discretionary immunity. We affirm in part, vacate in part, and remand.

I.

On August 9, 1999, SCDSS received a report that four-year-old Jane Doe and her eight-year-old brother, Kameron Cox, were victims of sexual abuse. The report alleged that Kameron had been sexually abused by his mother and that Jane had been sexually abused by her mother's boyfriend and her maternal grandfather. The biological father of the children was incarcerated in another state

Upon receipt of the report, SCDSS officials took the children into emergency protective custody. During the subsequent investigation, Kameron claimed that his mother had sexually abused him, and denied knowledge of anyone sexually abusing

Jane. Jane's mother denied abuse but reported that "Kameron had played with [Jane]'s private but she told him not to do it anymore." J.A. 479. Ultimately, the sexual abuse assessments and medical examinations were inconclusive as to whether the children had been sexually abused. However, the South Carolina Family Court found physical neglect and granted SCDSS temporary custody of the children. No findings were made regarding the sexual abuse allegations. Physical custody of the children was initially transferred to a maternal aunt, but she relinquished the children to SCDSS's legal custody in July 2000. They were placed in a group home until September 2000 when they were moved to their first state-approved foster home.

On June 18, 2001, Joy Bennett, the children's therapist, reported that Kameron had become increasingly angry and depressed at his inability to return to his mother's home. She stated that he posed a threat to himself and to Jane, and she recommended psychiatric hospitalization. However, she also recommended that, in order to maintain the bond between Kameron and Jane, the two ultimately should continue to be placed together "if this c[ould] be done safely" for Jane. J.A. 436. According to the psychiatric records, Kameron had a history of depression, suicidal and homicidal thoughts, and had become increasingly aggressive and hostile toward Jane. Kameron blamed Jane for their being in foster care "because she made statements that [their] mother, stepfather, and maternal grandfather [had] sexually molested her," but Kameron " d[id] not believe her allegations." J.A. 536. The psychiatric records also included a history of sexual

experimentation by Kameron and Jane with each other, possible sexual abuse of the children, and possible intergenerational incest.

On May 30, 2001, the defendant Debby Thompson, an employee of SCDSS, was assigned as the Adoption Specialist for the children. On July 5, 2001, Kameron was discharged from the hospital and placed in a foster home separate from Jane. Thompson began visiting the children later that month, but Kameron's threats to Jane necessitated postponement of recruitment efforts for a joint adoption of the siblings "until a determination of the appropriateness of an adoptive placement of [Jane] and Kameron together c[ould] be made." J.A. 493. On August 22, 2001, Bennett advised Thompson that Kameron "ha[d] been a danger to [Jane] and she should be protected," but that Bennett had "realistic hope that Kameron c[ould] deal with his emotions and be safely reunited with her." J.A. 439. She also noted that Jane "show[ed] some signs of sexual abuse including . . . a history of trying to sneak into Kameron's bed, probably for comfort through sexual contact." J.A. 440. Although the exact history of sexual abuse was unclear, Bennett noted that it was "very likely that they ha[d] engaged in inappropriate sexual encounters with adults and with each other." J.A. 440. During this period, Jane also began to exhibit acting-out behaviors of a sexual nature, including overly affectionate behavior towards boys and men, as well as anger and aggressiveness when she was frustrated.

On November 26, 2001, Jane was placed in foster care with Bill and Pam Hamerick, where she

could be seen by Kameron's therapist, Titsa M. Flesch, and have sibling visits with Kameron, including some overnight visits on weekends and holidays. On September 9, 2002, Kameron was placed in the Hamericks' home as well. By this time, SCDSS had filed an action in family court seeking to legally terminate the parental rights of the biological parents, in order to pursue a joint adoption of the siblings. Following a contested proceeding, the mother voluntarily relinquished her parental rights, and the parental rights of the father were judicially terminated. The family court granted "[c]ustody of the minor children. . . to [SCDSS] with all rights of guardianship, placement, care and supervision, including the authority to approve medical treatment or educational plans, to secure placement for the minor children and the sole authority to consent to any adoption, with the authority to seek such routine and emergency medical care as [SCDSS] deems necessary and in the best interests of said minor children." J.A. 316.

Plaintiffs Gregory and Michelle Johnson completed an application for adoption in May 2002. The Johnsons expressed their understanding that the "children [we]re in the system because of abuse, neglect, etc.," and they stated that they "fully understood the therapy issues." J.A. 673. They were willing to accept a child or children (including a sibling group) with "mild/treatable" sexual abuse, J.A. 673, but not a child who was "sexually aggressive" towards other children, J.A. 672. In January 2003, Thompson presented a background summary on Kameron and Jane to the Johnsons. Thompson claims that the summary contained all of

the information available to her about the children, including the allegations that they had been sexually abused. It stated that the children had been removed from the birth home for allegations of sexual abuse but that Jane had been inconsistent in her reports of abuse, alternatively naming her birth mother, Kameron, her maternal grandfather, and her mother's boyfriend as having been sexually inappropriate or abusive toward her. Kameron had also been inconsistent at times, both denying and admitting inappropriate contact with his mother. He denied knowledge of any inappropriate contact between Jane and the adults. In the end, the Johnsons were advised that SCDSS had been unable to substantiate or rule out sexual abuse of either child. However, the summary represented that "[t]here ha[d] been no reports of any sexually inappropriate behavior from Kameron *since* entering care" and that "[p]art of his therapy ha[d] been to insure that he understands boundaries, good touch-bad touch rules and appropriate social interactions." J.A. 280 (emphasis added).

On February 28, 2003, Jane and Kameron were placed with the Johnsons for prospective adoption. Approximately four weeks after the placement, however, the Johnsons chose not to proceed with the adoption of Kameron, and he was removed from the Johnsons' home. Among other things, Kameron was believed to have inappropriately touched the Johnsons' biological son. Jane remained with the Johnsons though, and her adoption was finalized on November 6, 2003.

Approximately one year later, Kameron admitted to his therapist that he had sexually abused Jane prior to SCDSS's removal of them from the birth home. Kameron also claimed to have sexually abused seven foster children while in foster care, both before and after his placement with the Johnsons. Kameron's social worker notified the Johnsons that Kameron had claimed to have had an inappropriate sexual relationship with Jane prior to SCDSS's taking custody of them, but Jane told her therapist "that Kameron was lying and that they were still having 'sex' until they moved in with [the Johnsons]." J.A. 872. She also claimed that she told Thompson and Flesch that Kameron had sexually abused her while she was with the Hamericks and at other foster homes that she could not recall, although she was inconsistent as to whom she told first. According to Jane, Thompson "told her not to tell anyone or they would never adopt her." J.A. 872. Thompson denies that Jane made any such report to her. She claims that she received no reports of any inappropriate behavior or contact between Jane and Kameron occurring during her relationship with Jane, and represents that she never observed any behavior which would have led her to believe that Jane and Kameron were having sexual or other inappropriate contact at that time.

Since the disclosure, Jane's behavior has significantly deteriorated. According to the Johnsons, she cannot be left alone or trusted, they are unable to obtain any help supervising her, and they cannot leave her alone with other children for fear that she will act out sexually. Among other things, she is physically and sexually aggressive,

violent towards the Johnsons and their biological children, and abusive to animals. Her behavior has necessitated therapeutic placements outside the home, and further care and treatment is believed to be indicated.

The Johnsons subsequently filed suit on their own behalf, and as parents and guardians of Jane, against Thompson. They alleged under § 1983 that Thompson violated Jane's substantive due process rights under the Fourteenth Amendment by placing her in foster care settings with Kameron knowing that Kameron was sexually abusive toward Jane. The Johnsons alleged that Thompson also violated their substantive due process rights by failing to fully disclose the sexual history of Jane and Kameron prior to Jane's adoption. The Johnsons filed a second suit in state court against SCDSS, pursuant to the SCTCA, alleging numerous state law claims, including a claim of gross negligence on the part of SCDSS employees in the placement and adoption process. This action was removed to the district court and consolidated with the federal action.[1]

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[1] A number of additional parties, known and unknown, were originally named as defendants in both lawsuits. The only remaining claims on appeal, however, are the § 1983 substantive due process claims against Thompson and the gross negligence claims against SCDSS. The Johnsons also included as plaintiffs ten unnamed and unidentified children allegedly sexually molested by Kameron while in foster care, but they have not certified the matter as a class action, identified these children, or demonstrated that they have standing to bring the action on their behalf. To the extent the Johnsons pursue these claims on appeal, we summarily affirm their dismissal.

Thompson moved for summary judgment, claiming that she was entitled to qualified immunity from suit for the § 1983 claims. SCDSS also moved for summary judgment, claiming that it was entitled to discretionary immunity from suit for the state law claims under the SCTCA. The district court granted the defendants' respective motions for summary judgment on all claims, and this appeal followed. We review the district court's decision to grant summary judgment to the defendants *de novo*. *See Johnson v. Caudill*, 475 F.3d 645, 650 (4th Cir. 2007).

II.

A.

Qualified immunity from § 1983 claims "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It is intended to "balance[ ] two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

Claims to qualified immunity present a two-pronged inquiry. The governmental official will be granted immunity unless (1) "the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a

violation of a constitutional right," *Pearson*, 129 S. Ct. at 815-16, *and* (2) "the right at issue was 'clearly established' at the time of [the] alleged misconduct," *id.* at 816. However, it is within our discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818; *see Hunsberger v. Wood*, 570 F.3d 546, 552 (4th Cir. 2009).[2]

This case involves the important issue of whether and under what circumstances a child who has been involuntarily removed from her home by state social workers and knowingly placed in a dangerous foster care environment may state a claim for damages under § 1983. Because we believe this case will clarify and elaborate upon our prior jurisprudence in important and necessary ways, we will first address the constitutional rights of foster children in such circumstances prior to addressing whether any such rights were clearly established at

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[2] At the time of the district court decision, the Supreme Court directive was that courts address the first prong, and determine whether there was a violation of a constitutional right, prior to turning to the second prong to determine whether that right was clearly established at the time of the alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). This, the Court reasoned, was "necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation." *Pearson v. Callahan*, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565 (2009). In *Pearson*, however, the Supreme Court held that "the *Saucier* procedure should not be regarded as an inflexible requirement," and that courts may choose in appropriate circumstances to grant qualified immunity to state actors "on the ground that it was not clearly established at the time [of the challenged acts] that their conduct was unconstitutional." *Id.* at 813.

the time of the alleged wrongdoing. *See Pearson*, 129 S. Ct. at 818 (confirming that the *Saucier* "two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable").

B.

The Due Process Clause of the Fourteenth Amendment bars States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Clause "guarantees more than fair process." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (internal quotation marks omitted). It "also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* (internal quotation marks omitted); *see County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (The Due Process Clause "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." (internal quotation marks omitted)); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995) ("Substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement them." (internal quotation marks omitted)).

Here, Jane claims that Thompson violated her substantive due process right to reasonable safety

and security when Thompson placed Kameron with Jane in foster care, knowing that Kameron was sexually abusing Jane. At a minimum, she asserts that Thompson knew or should have known that the sexual abuse was or probably would be continuing and was deliberately indifferent to the risk Kameron posed to her. The district court rejected the claim, however, holding that Jane had no substantive due process right to affirmative state protection from violence inflicted at the hands of Kameron, a private actor, in the foster care setting. Accordingly, it held that Thompson was entitled to qualified immunity from suit.

1.

As a general rule, "the Due Process Clause works only as a negative prohibition on state action," *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995) (en banc), and the state's "failure to protect an individual against private violence simply does not constitute a violation of [it]," *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Thus, it "serves 'as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security,'" *Patten v. Nichols*, 274 F.3d 829, 836 (4th Cir. 2001) (quoting *DeShaney*, 489 U.S. at 195), and "does not require governmental actors to *affirmatively* protect life, liberty, or property against intrusion by private third parties," *Pinder*, 54 F.3d at 1174 (emphasis added); *see Patten*, 274 F.3d at 836 ("[T]he clause 'confer[s] no affirmative right to

governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" (quoting *DeShaney*, 489 U.S. at 196)). And, because "the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *DeShaney*, 489 U.S. at 196-97.

In *DeShaney*, the state's Department of Social Services received several reports of suspected physical abuse of a child, Joshua DeShaney, while he was in the custody of his father. The state failed to intervene and Joshua was eventually beaten and permanently injured by his father. Relying upon the Supreme Court's decisions in *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (holding that a state's "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983" for violation of the Eighth Amendment), and *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (employing the Fourteenth Amendment to hold that disabled persons who are involuntarily committed to a state hospital retain "constitutionally protected [liberty] interests in conditions of reasonable care and safety"), Joshua and his mother sued the department and its employees under § 1983, alleging that they had similarly "deprived Joshua of his liberty interest without due process of law . . . by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *DeShaney*, 489 U.S. at 193.

Although noting that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *id.* at 198, the *DeShaney* Court held that the defendants owed no such duty to Joshua. This was because in *Estelle* and *Youngberg* the affirmative duty arose not from knowledge of any particular danger or an intent to help, but rather from the state's act of taking the individual into its custody and care.

> Taken together, [*Estelle* and *Youngberg*] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199-200 (citations and footnote omitted); *see Patten*, 274 F.3d at 841 ("[T]he Supreme Court in *DeShaney* made it clear that an exception to the general no-duty-to-act rule arises only if the state takes an individual into custody; if there is no custodial relationship, then the state has no duty to protect."); *Pinder*, 54 F.3d at 1175 ("Some sort of confinement of the injured party — incarceration, institutionalization, or the like — is needed to trigger the affirmative duty [to protect]. This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause." (citation omitted)). Thus, "[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not [the State's] failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney*, 489 U.S. at 200.

Joshua could not state a substantive due process claim against the state officials because "the harms [he] suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." *Id.* at 201. Furthermore, "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.*

2.

The issue before us today, however, is whether a child who has been involuntarily removed from her home by state officials for abuse or neglect, placed in the legal custody of the SCDSS, and transferred to state-approved foster care by SCDSS officials can state a substantive due process claim against a state social worker for violations of her fundamental right to personal safety and security analogous to that recognized in *Estelle* for prisoners and in *Youngberg* for the involuntarily committed and, if so, what degree of culpability must be demonstrated to subject the social worker to liability under § 1983.

As the *DeShaney* Court noted, several circuit courts had already "held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents." *Id.*; *see, e.g.*, *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc) (holding that a child involuntarily placed in a foster home may state a cause of action under § 1983 for the state official's deliberate indifference to her right to safety); *Doe v. New York City Dep't. of Soc. Servs.*, 649 F.2d 134, 145 (2d Cir. 1981) (holding that "[d]efendants may be held liable under § 1983 [for a child's injuries suffered during foster care] if they . . . exhibited deliberate indifference to a known injury, a known risk, or a specific duty."). In such cases, unlike in *DeShaney*, there would not be a mere "failure to act" on the part of a state official to remove a child from a family member, but rather the exercise of affirmative state action in the form of

involuntary removal and placement of the child in a dangerous, foster care environment, *i.e.*, a "restraint of personal liberty triggering the protections of the Due Process Clause." *DeShaney*, 489 U.S. at 200. The *DeShaney* Court, however, expressly declined to decide the question because, unlike in these situations, the state had returned Joshua to the custody of his father. *See id.* at 201 n.9 (declining to decide whether a substantive due process claim could have been brought "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents").

Since *DeShaney*, additional circuits have also recognized the right of a foster child to bring a substantive due process claim where state officials have taken the affirmative action of involuntarily removing the child from his home and placing him in a known, dangerous foster care environment, in deliberate indifference to the child's right to reasonable safety and security. In *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), for example, the court distinguished *DeShaney* and applied a custodial exception to recognize a due process claim where a child was involuntarily removed from the custody of his parents and placed by child welfare workers with a foster parent the state knew or suspected to be a child abuser:

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private

> persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state *removed* a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights either under the cruel and unusual punishments clause of the Eighth Amendment (held applicable to the states through the Fourteenth Amendment) if he was a convicted prisoner, or the due process clause if he was awaiting trial. In either case the state would be a doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to lions.

Id. at 848-49 (citations omitted); *see Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997) ("[O]nce the State removes a child from her natural parents, it assumes at least a rudimentary duty of safekeeping. It cannot place a child in custody with foster parents it knows are incompetent or dangerous." (citation omitted)); *see also Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) ("[W]hen [a] state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it

certain affirmative duties" which, if attended to in a manner deliberately indifferent to the safety of the child, can give rise to liability under § 1983); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) ("[A] special custodial relationship . . . was created by the state when it took [a child] from his caregiver and placed him in foster care" where the "child los[t] his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs."); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) ("[C]hildren in the custody of a state ha[ve] a constitutional right to be reasonably safe from harm" and "if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs."); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that substantive "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes" where the complaint alleged that the state officials "were 'deliberately indifferent' to reports of abuse" in the foster home).

3.

Relying upon a trilogy of cases discussed below, Thompson contends that our circuit, in contrast to our sister circuits, has answered *DeShaney*'s unresolved question in the negative and would not recognize such a claim of deliberate indifference in the foster care placement, and the district court "reject[ed] plaintiffs' attempt to establish a custodial or foster care exception to the

DeShaney rule," even in the limited context that we face today. J.A. 1004. While we agree with Thompson's alternative contention that any such right was not clearly established at the time she made her placement decisions in this case, we disagree that they foreclose our recognition of such a right in appropriate cases.

In *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), a minor child who had been voluntarily placed in foster care by his parents sustained significant injuries which were reported by medical providers to social services officials as suspected child abuse. After the fourth such incident, the officials intervened and removed the child from the foster home. Applying *DeShaney*, we held that the child had no substantive due process right to affirmative protection by the state. First, the state "by the affirmative exercise of its power had *not* restrained the [child's] liberty; he was voluntarily placed in the foster home by his natural parents." *Id.* at 476 (emphasis added). In addition, "the injuries to the [child] did not occur while he was in the custody of the State of Maryland, [but] rather while he was in the custody of his foster parents, who were not state actors." *Id.* There being no affirmative exercise of the state's power to restrain the child's liberty in the first instance, there could be no corresponding duty or responsibility on the part of the state officials to protect the child from harm by private parties. *See K.H.*, 914 F.2d at 849 (noting our decision in *Milburn* to be "[c]onsistent with [its custodial] distinction," as *Milburn* "emphasize[d] the state's lack of responsibility for a child's *voluntary* placement by

the natural parents in an abusing private foster home"); *cf. Walton v. Alexander*, 44 F.3d 1297, 1303-04 (5th Cir. 1995) (en banc) ("Since *DeShaney* was decided. . ., we have followed its language strictly and have held consistently that *only* when the state, by its affirmative exercise of power, has custody over an individual *involuntarily or against his will* does a 'special relationship' exist between the individual and the state.").

In *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990), we held that a foster child could not maintain a substantive due process claim against state agents who had affirmatively removed the child from the home of his natural father, upon allegations of abuse, where the child was immediately transferred to the custody of his natural grandmother and then to his natural mother. At no point was the child in foster care, nor was there any prior indication that the family members to whom the child was transferred posed any danger to the child. We agreed "that *DeShaney* [was] applicable to the extent that Maryland had no duty to provide [the child] with protective services" in the first instance and held that "the transfer of custody [from one family member to another] did not make the State 'the permanent guarantor' of [the child's] safety." *Id.* at 392 (quoting *DeShaney*, 489 U.S. at 201). Also, as in *Milburn,* any actual physical harm that was inflicted upon the child at the hands of his family members "was not [harm] inflicted by the State." *Id.*

This brings us to the case of *White ex rel. White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997), and the one most analogous to the case before us. In

White, SCDSS officials involuntarily removed Keena White, a minor child, from the physical custody of her natural mother and placed her in an approved foster home, where she later died from severe blows to the head. The mother brought a § 1983 action alleging that the SCDSS officials had a duty to protect Keena from abuse after her placement in foster care and, in the alternative, had been deliberately indifferent in their placement of Keena in the foster home.

We rejected the plaintiff's claim that there was a general duty on the part of the SCDSS workers to protect the child from abuse after she was placed with the foster family because "children placed in foster care ha[ve] no federal constitutional right to state protection" and "the state ha[s] no affirmative constitutional obligation to protect individuals against private violence." *Id.* at 737 (citing *Milburn*, 871 F.2d at 476); *see id.* at 738 ("'[H]arm suffered by [the] child at the hands of h[er] foster parents [wa]s not harm inflicted by state agents,'" (quoting *Weller*, 901 F.2d at 392)). We further noted that, as it pertains to this principle, *Milburn* was not limited in "its application to situations where parents had voluntarily placed their children in foster care." *Id.*

In this case, SCDSS takes the position that no protection means no protection and that Fourth Circuit law allows SCDSS officials to also escape § 1983 liability when they affirmatively place a child in a known dangerous environment, including, for example, with a known child predator. However, in *White*, we declined to dispose of the question of

whether a § 1983 action could be maintained against a social worker who knowingly places a child in a dangerous foster care environment, in deliberate indifference to the child's fundamental right to personal safety and security. Instead, we held that the factual record before us there fell short of demonstrating any such deliberate indifference. *See id.* at 737 ("Whatever the clearly established law on this question, White's claim simply falls short on the facts. The summary judgment record contains no evidence to indicate that any of the DSS defendants knew or suspected that the [foster parents] were abusive foster parents when they placed Keena in their care. Indeed, the [foster parents] were licensed by the DSS, and White points to no evidence indicating that the [foster parents] had previously been accused of, or investigated for, child abuse."). Such "[a] claim of deliberate indifference, unlike one of negligence," we held, "implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." *Id.*

We now hold that when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing "some responsibility for [the child's] safety and general well-being." *DeShaney*, 489 U.S. at 200. Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security. This does not mean that social workers will be duty-bound to protect the

child from unknown harm or dangers. Nor "does [it] mean that every child in foster care may prevail in a section 1983 action against state officials based on incidental injuries or infrequent acts of abuse." *Taylor*, 818 F.2d at 797. Negligence, and even carelessness, on the part of such officials that results in harm to the child will not support a claim. But "where it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child," liability may be imposed. *Id.* Such "[a] claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." *White*, 112 F.3d at 737.

C.

Here, Jane was involuntarily removed from the custody of her natural parents by affirmative state action and ultimately placed in foster care approved by SCDSS. The state filed a complaint in family court alleging abuse, sought emergency and temporary custody and, ultimately, terminated the parental rights of her biological parents by judicial order. *See* S.C. Code Ann. § 20-7-1576 ("An order terminating the relationship between parent and child . . . divests the parent and the child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, except the right of the child to inherit from the parent."). Thus, unlike the children in *DeShaney*, *Milburn* and *Weller*, Jane was clearly within the custody and control of the state social services department when foster care placement decisions were made.

Accordingly, the state officials responsible for those decisions had a corresponding duty to refrain from placing her in a known, dangerous environment in deliberate indifference to her right to personal safety and security.

We affirm the grant of summary judgment, however, under the second prong of the qualified immunity inquiry. Although our precedents do not foreclose a foster child's claim that her substantive due process right to personal safety and security is violated by a foster care placement made in deliberate indifference to a known danger, such a right was not clearly established in this circuit at the time Thompson made her placement decisions regarding Jane.

In determining whether there has been a violation of a constitutional right, we must identify the right "at a high level of particularity." *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). "In order for a right to be 'clearly established,' the Supreme Court has instructed that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *White*, 112 F.3d at 737 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Although notice does not require that the 'very action in question has previously been held unlawful,' it does mean that 'in the light of pre-existing law the unlawfulness must be apparent.'" *Robles v. Prince George's County*, 302 F.3d 262, 270 (4th Cir. 2002) (quoting *Wilson v. Layne*, 526 U.S. 603 (1999) (internal quotation marks omitted)).

"In determining whether a [constitutional] right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Edwards*, 178 F.3d at 251 (internal quotation marks and alteration omitted); *see Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (en banc) (A law is "clearly established" when "the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." (internal quotation marks omitted)).

For the reasons discussed above, our precedents in *Milburn*, *Weller*, and *White* do not alone foreclose Jane's substantive due process claim. But neither did they, or any other precedent in the Supreme Court or this court, clearly establish that such a claim might have existed at the time of the placements. And while we disagree with the district court's interpretation of *DeShaney* and our precedents, we do not view the interpretation to have been unreasonable. "[I]f judges . . . disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; *see Hogan v. Carter*, 85 F.3d 1113, 1116 n.3 (4th Cir. 1996) (en banc) ("Although there might be instances where a reasonable jurist, but not a reasonable official, would consider particular conduct violative of clearly established law, if a reasonable jurist would not have viewed the defendant's action as violative of clearly established law, then it necessarily follows that the reasonable

officer likewise would not have viewed that conduct as violative of clearly established law."); *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("Since qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, it surely must be appropriate when reasonable jurists can do so." (citation omitted)).

Here, when the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity.[3]

III.

We turn briefly now to the Johnsons' § 1983 claim that Thompson violated their substantive due process rights by placing Jane and Kameron in their home without fully disclosing Jane's history of

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[3] Because it is unnecessary to our disposition of this case, we decline to decide whether the record contains sufficient, admissible evidence to support Jane's claim that Thompson's decision to reunite Jane and Kameron in foster care rose to the level of deliberate indifference.

sexual abuse and sexual aggressiveness. The Johnsons acknowledge that the background summary presented to them by Thompson related some of this history. However, they assert that Thompson failed to disclose much of the history and reassured them that no inappropriate sexual behavior had occurred between the children, leading them to believe that the more serious allegations were unsubstantiated. They assert that had they known of the incest, and of Jane's sexually aggressive behavior, they would not have accepted Jane for prospective adoption or finalized her adoption. Thompson asserts that she presented all known information to the Johnsons and that she received no reports of inappropriate behavior between the children during her relationship with Jane.

The district court held that prospective adoptive parents have no substantive due process right to the disclosure of a child's history of sexual abuse and that Thompson was entitled to qualified immunity. We agree. The Johnsons have pointed to no authority from the Supreme Court, this court or, for that matter, any circuit court of appeals granting prospective adoptive parents a substantive due process right to "full disclosure" about a child under consideration and certainly no "clearly established" authority which would have put Thompson on notice that she was violating any such right. Accordingly, we affirm the grant of summary judgment on this claim as well.

IV.

The plaintiffs' final claim is that the district court erred in granting summary judgment to SCDSS on their state law claim for gross negligence on the part of the SCDSS officials who handled Jane's foster care placements and adoption.

In the state court action, the plaintiffs originally asserted claims for gross negligence, assault and battery, intentional infliction of emotional distress/outrage, negligent supervision, negligent training, false imprisonment, and premises liability. The district court dismissed all claims, holding that the decisions made by the SCDSS employees were discretionary in nature, entitling SCDSS to discretionary immunity under § 15-78-60(5) of the SCTCA.

The SCTCA constitutes the exclusive remedy for torts allegedly committed by employees of state agencies. *See* S.C. Code Ann. § 15-78-70(a). Under the Act, a governmental entity, such as SCDSS, is subject to liability for torts "in the same manner and to the same extent as a private individual. . . ." S.C. Code Ann. § 15-78-40.[4] However, the Act is a limited waiver of governmental immunity from suit and contains a list of exceptions to the waiver of immunity, including an exception for discretionary acts by the entity or its employees. Specifically,

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[4] Because the actions complained of were taken by governmental employees acting within the course and scope of their employment, the district court correctly noted that SCDSS should be substituted as the party defendant for the individual defendants. *See* S.C. Code Ann. § 15-78-70(c).

under § 15-78-60(5), "[t]he governmental entity is not liable for a loss resulting from . . . the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." *Id.*

Under South Carolina law, discretionary immunity is normally "contingent on proof that the [governmental entity], faced with alternatives, actually weighed competing considerations and made a conscious choice" to act. *Niver v. South Carolina Dep't of Highways & Pub. Transp.*, 395 S.E.2d 728, 730 (S.C. Ct. App. 1990). "[T]he governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them." *Foster v. South Carolina Dep't of Highways & Pub. Transp.*, 413 S.E.2d 31, 35 (S.C. 1992). Generally speaking, the SCTCA must be liberally construed in favor of the governmental defendant. *See Faile v. South Carolina Dep't of Juvenile Justice*, 566 S.E.2d 536, 540 (S.C. 2002). However, "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Niver*, 395 S.E.2d at 730.

SCDSS asserts that it met its burden of establishing application of the discretionary acts exception to the waiver of immunity under S.C. Code Ann. § 15-78-60(5), because its employees relied upon professional standards when making the

discretionary decision to place the children together and pursue their adoption as a sibling group. The district court agreed and held that SCDSS was entitled to discretionary immunity.

On appeal, the plaintiffs contend that, even if the majority of the state law claims were properly dismissed, the gross negligence claim was not because § 15-78-60(25) of the SCTCA excepts gross negligence from the normal application of discretionary immunity under § 15-78-60(5). S.C. Code Ann. § 15-78-60(25) provides that "[t]he governmental entity is not liable for a loss resulting from . . . responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, *except when the responsibility or duty is exercised in a grossly negligent manner.*" *Id.* (emphasis added).

The South Carolina Supreme Court has held that "[s]ection 15-78-60(25) provides an exception to [discretionary] immunity where the governmental entity exercises its responsibility or duty in a grossly negligent manner" and that "Section 15-78-60(5) must be read in light of this exception. If discretion is exercised in a grossly negligent manner, the exception to the normal rule of immunity applies." *Jackson v. South Carolina Dep't of Corr.*, 390 S.E.2d 467, 469 (S.C. Ct. App. 1989) (per curiam). It is unclear whether the Johnsons made this precise argument below, and the district court order does not separately or explicitly address the question of whether SCDSS is entitled to discretionary

immunity from liability for the gross negligence claim. However, it does appear that South Carolina may recognize an exception to the grant of discretionary immunity where state officials exercise a duty to supervise, protect, control, confine, or maintain foster children "in a grossly negligent manner." *Id.*

Under the circumstances, we believe the best course is to vacate the grant of summary judgment on the state law claim for gross negligence and remand for the district court's consideration of the applicability of § 15-78-60(25) or, if deemed appropriate given our affirmance of summary judgment as to the federal claims, the propriety of remanding the state law claim back to the state court for its determination.[5]

V.

For the foregoing reasons, we affirm the district court's grant of summary judgment as to all claims asserted under § 1983 against Thompson. We vacate the grant of summary judgment as to the state law claim for gross negligence against SCDSS, and remand that claim for further consideration.

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[5] As the district court observed, the presentation of the claims below has been somewhat unclear. However, the claim for gross negligence asserted against SCDSS is contained solely within the state court complaint, which was removed to the district court and consolidated with the federal court action. Although the state court complaint also contained some federal claims, Thompson was not a named defendant. Accordingly, our decision today affirms the grant of summary judgment as to all claims in the federal court complaint and all *but* the state law claim for gross negligence in the state court complaint.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

WILKINSON, Circuit Judge, concurring in the judgment:

I agree with the affirmance of the grant of summary judgment to Thompson on all federal claims.* Maj. Op. at 26. I agree also with the vacatur of summary judgment and remand on the state claim, with explicit permission for the district court to further remand those claims back to state court. Maj. Op. at 26.

State court is the place where claims such as these should be heard. We should not further constitutionalize this intensely domestic area of the law. Every tort committed in this country by some public actor was never meant to be a matter of constitutional import. *See Paul v. Davis*, 424 U.S. 693, 701 (1976).

I disagree with the view that the Constitution imposes upon states a "duty to protect" children from harm by non-state actors in foster homes. Maj. Op. at 19-20. Such a holding is appealing in rhetoric and harmful in practice. The majority's rule constitutes an unnecessary expansion of substantive due process

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* Specifically, I concur in the majority's view that, at the very least, qualified immunity is appropriate here on plaintiffs' cause of action for failure to protect, Maj. Op. at 20, and in the majority's view that there is no federal cause of action for failure to disclose. Maj. Op. at 23.

that, however well-intentioned, will visit real misfortune upon abused and neglected children. The creation of this federal cause of action is not merely a misadventure in constitutional theory but a real-life loss for those most in need of help.

I.

Faced with the wrenching allegations of this case, it is understandably tempting to rush to Jane's rescue and somehow right whatever wrongs were perpetrated against her. I certainly share the majority's sympathy for any child subject to sibling sexual or physical abuse. However, I fear that the legal rule established, ironically and tragically, will have the exact opposite effect of that which is intended. Instead of helping children escape the desperate environment of abuse and neglect, it likely will hinder them in doing so. It will create a perverse set of incentives that will deter states and foster families from providing helpless children with the assistance they need.

More specifically, the new substantive due process right fashioned by the majority will lead to a combination of two separate but equally devastating effects: first, it will discourage states from taking legal custody of children in the first place, and second, it will discourage potential foster parents from becoming foster parents. Both outcomes disadvantage the countless children beaten, molested, or abandoned by their biological families—children who desperately need the safe haven provided by state custody and offered by willing foster families. In short, the "duty to protect" may

well discourage protection and, ultimately, encourage harm.

A.

The first potential result of today's decision is to dissuade states from assuming legal custody of children altogether. As *DeShaney* made clear, and as the majority admits, if a state avoids taking custody of a child, it cannot be held legally responsible for harm suffered by the child, even if the state knew about the harm and stood by to watch. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989); Maj. Op. at 12-13. A "duty to protect" arises, if at all, "only if the state takes an individual into custody; if there is no custodial relationship, then the state has no duty to protect." *Patten v. Nichols*, 274 F.3d 829, 841 (4th Cir. 2001).

By contrast, if a state takes legal custody of a child, it now potentially faces steep liability. Before this decision, a state taking custody of a child from her biological parents, against the parents' wishes, already risked one form of litigation: a section 1983 suit by the biological parents for a violation of their substantive due process rights to "retain custody over and care for their children, and to rear their children as they deem appropriate." *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994) (citations omitted). Now, after this decision, a state taking custody of a child from her biological parents, against the parents' wishes, is subject to a second form of litigation: a section 1983 suit by the child herself, perhaps brought many years after the

initiation of custody, for a violation of the child's substantive due process rights to "safety and general well-being." Maj. Op. at 19 (quoting *DeShaney*, 489 U.S. at 200). By piling on this additional cause of action, the majority has littered the path to protecting children with section 1983 landmines.

Thus, in deciding whether to assume custody of a child, states are faced with two possible choices: allow the child to continue to suffer, with no accompanying risk of liability, or rescue the child and quite possibly defend against two lawsuits. It doesn't take a Law and Economics scholar to figure out how these prospects will affect rational state actors. The majority's "duty to protect" essentially rewards states for the exact opposite: for not protecting and for doing nothing. As we have previously recognized, "[i]f section 1983 liability attaches too readily to removal and placement decisions, the course of public agencies would invariably become one of inaction, thus leaving children in abusive environments." *White ex rel. White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997). The danger of deterrence in this context is particularly acute. In the case of law enforcement, any deterrent effect caused by section 1983 suits is often mitigated by the inevitable public outcry over crime gone unaddressed. In the case of abused and neglected children, however, public outrage is often absent, since abuse occurring to the defenseless behind closed doors is typically invisible to public view.

We never learn, of course, precisely when the threat of liability produces inaction. The failure of

agencies to take action never hits the judicial radar in quite the same manner as actions allegedly gone awry. But stacking the legal deck in the direction of inaction surely carries costs of its own. The skewing of incentives toward inaction can only harm those children who are badly mistreated by their biological families and who badly long to escape their hapless home surroundings. I need not detail the physical violence, sexual abuse, substance addiction, or outright abandonment and neglect that befall young children at the hands of those who should love them most. These sad stories are familiar to us all. *See, e.g.*, *DeShaney*, 489 U.S. at 191-93.

For these children, the threat comes not from the state's assumption of custody but from the state's refusal to assume custody. A social worker may sometimes seem about as popular as a tax collector, but sometimes that same social worker is a child's only lifeline, her sole hope of escaping a perfectly brutal and life-scarring state. By slamming social workers with multiple prospects for substantive due process suits, the majority's opinion discourages them from exercising custody and encourages them to leave children "defenseless in the face of physical abuse and brutality." *White*, 112 F.3d at 736.

This case illustrates the perils of a rule that discourages states from taking custody of children. Whatever SCDSS might or might not have done wrong once it removed Jane from her home, no one contends that SCDSS should have left her there. Jane's biological mother neglected her, as the South Carolina Family Court determined after a probable cause hearing, and allegedly sexually abused her;

Jane's biological father was incarcerated; and moreover, Jane's brother allegedly sexually abused her in their biological home even before he allegedly sexually abused her in foster homes. Thus, while it is all too easy to shovel opprobrium on SCDSS for its alleged shortcomings and make it the scapegoat for a terribly sad set of circumstances, it is worth remembering that the agency did not create the dangers of abuse or neglect. Those dangers were present long before SCDSS came on the scene, and ameliorating them is often no easy or simple task. But leaving the child to her fate is not the answer, and I respectfully protest the creation of multiple causes of action that encourage agencies to do just that.

B.

The majority's approach is likely to have a second and similarly unfortunate effect: causing some who would otherwise choose to become foster parents to abandon their plans. If and when states do decide to assume legal custody, they will now need to be more on guard than ever against section 1983 suits, and in an effort to fulfill their new "duty to protect," states may become overly intrusive into the foster family unit. To be sure, some level of supervision is necessary. But to ensure that foster parents are not even unwittingly laying the basis for a later section 1983 action, states may go overboard, checking in on foster children in frequent, unexpected, inconvenient, and invasive visits to foster homes. States may subject foster parents to an onslaught of prying questions about their private lives. Further, lest they later face accusations of a

constitutional nature, years after the fact, states may feel compelled to micro-manage the foster parenting process, dictating basic choices about diet, hygiene, education, activities, schedule, and interactions with peers—choices that are normally left to parents.

This is all contrary to the basic purpose of the Due Process Clause, which "was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 196. Instead of protecting foster children from the state, the majority uses the Due Process Clause to require states to protect foster children from other foster children, including, as here, their own biological siblings. Maj. Op. at 19-20. Leaving aside the fact that managing sibling relationships is among the foremost of parental duties, this rule might, at least on the margins, induce a state into deliberately placing siblings in different foster homes, just to be safe. Of course, there are undoubtedly cases in which we might want states to separate siblings, and if the facts alleged in this case turn out to be true, this case might be one of them. However, there are undoubtedly many other cases in which we would not want to skew legal incentives toward separating siblings. Children removed from their biological homes have already endured one significant dislocation, and we should not maximize the disruption of what remains of their family by placing law on the side of pulling them apart from their brothers and sisters.

For SCDSS, the only way to forestall a suit over whether an initial foster placement was good or

bad is to continually monitor its consequences. But who would want to remain a foster parent under such a regime? The increased state intrusiveness encouraged by the majority's decision will again not work to the advantage of children. Although such heightened oversight may ferret out abuse by foster parents in a few cases, it is just as likely, and probably more so, to deter many fine individuals from ever agreeing to become foster parents in the first place. Although foster parents and biological parents do not share identical rights, they share similar purposes. As the Supreme Court has noted:

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children . . . . No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least [in certain cases], it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family."

Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (citations omitted). To be effective, foster parents need some freedom in deciding how to raise their children and need to bond with their children away from the state's watchful eye. If agencies fearful of federal "duty to protect"

suits are constantly making suspicion-laden inquiries and trying to direct decisions best made by parents, the satisfactions of foster parenting cannot be enhanced. And by making it less appealing to become a foster parent, fewer individuals will volunteer. Without willing foster families, children who are abused by their biological families will be increasingly deprived of a substitute home in which to find sanctuary.

The majority's analysis further works to put off potential foster parents by painting foster homes in an unfortunate light. The majority concludes that a state's removal of a child from her biological home is an exercise of custody sufficient to trigger the "duty to protect," insofar as it deprives the child of liberty in a manner "analogous to that recognized in *Estelle* for prisoners and in *Youngberg* for the involuntarily committed." Maj. Op. at 13-14. Indeed, the majority believes that the state's custodial relationship continues even *after* the state has placed a child in the care of foster families. Maj. Op. at 13-14.

Any comparison of the foster home environment to that of prisons and mental health institutions for substantive due process purposes is misplaced. A foster home is not a prison; a child therein is not "in custody" in the sense that inmates are; and such an analogy is a poor foundation for an expansion of substantive due process. Foster parents, who are rarely state actors, *see Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), would hardly find it flattering to learn that their efforts at raising

children were being analogized by courts to those of prison wardens and mental health superintendants. While wardens and superinten-dents provide valuable functions, most foster parents approach their responsibilities in a different spirit. By extending custody to the case at bar, the majority has drifted far afield from the context of physical confinement envisioned by *Estelle* and *Youngberg*. Those cases use words such as "incarceration" and "institutionalization" to describe actionable physical restraints, *see DeShaney*, 489 U.S. at 200, terms which are singularly inapposite to the foster home setting. In expanding the concept of custody in this fashion, the majority has misapprehended the nature of foster parents' services, all the while risking a variety of untoward effects.

The majority attempts to lull us into a false sense of security with its ruling that the state must have acted with "deliberate indifference" in its placement decisions in order for section 1983 liability to attach. Maj. Op. at 20. Under this standard, the majority reassures us, social workers will not be liable for "unknown harm or dangers" or every time a child suffers "incidental injuries or infrequent acts of abuse." Maj. Op. at 20 (citations and internal quotations omitted). Therefore, in theory, states should fear liability only in those cases where they have acted in a particularly blameworthy manner.

But these words are of little comfort. Standards of review are regrettably all too often in the eye-of-the-beholder. And words such as "incidental," "infrequent," and even "unknown"

(which slips into "should have known") are by their nature elastic and at best imperfect protection against even groundless litigation. Thus, in practice, states will be deterred both from taking custody of abused children and encouraged to intrude upon foster families to the detriment of that unit, not because such decisions were dictated by their merits, but because of a threat of future liability. The mere threat of litigation is enough to give officials pause, because even when state workers are ultimately absolved, litigation takes a toll. By diverting government officials from their duties, litigation "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources," *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009), and potentially even "deter[s] . . . able citizens from acceptance of public office," or in this case social work. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

To say the Constitution of the United States allows us to court these consequences, or even to flirt with the unpredictability of such serious harms, betrays an inflated conception of the federal judicial role. It is the majority's mistaken view of the boundaries of our function that I shall address in the next section and with which I also respectfully take issue.

II.

Law exists in part to guard against the overreaching of public authority, and from that general purpose the life-tenured federal courts are not exempt. When the many cautionary maxims of restraint are toppled like dominos, the chances of

judicial miscalculation exponentially increase. The majority's discovery of a constitutional "duty to protect" is badly misguided. But even if it were not—even if it were a great idea —we should not indulge in its creation. Federal courts simply do not have a roving warrant to adopt whatever policies they believe to be beneficial, all in the name of substantive due process. The project of creating such a duty should be left to the states, via statutes or the common law of tort. It does not belong to the federal government, via the Constitution. In creating this new "duty to protect," the majority commandeers a role traditionally—and for good reason—entrusted to state legislatures.

A.

To begin, by federalizing the "duty to protect," the majority trespasses on the most traditional of state roles. The core legal question in this case—who may be held liable for physical and psychological harm inflicted by one foster child upon another foster child—is essentially one of tort and domestic relations law. Both legal realms have historically and justifiably been reserved to the states. Decisions in these areas require weighing a number of competing policy considerations. Deciding whether and to what extent to impose a "duty to protect," for example, demands a delicate balancing of the interests of children, foster parents, biological parents, and states. Others have devoted far more thought to these hard problems than we ever could. Given their experience with, and acquired expertise over, matters of tort and family law, states are better suited than the federal government to make such

intricate determinations. As the Supreme Court explained, the "host of policy choices" implicated in cases such as this one "must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992).

Indeed, most states have made such policy choices, enacting statutes addressing whether and when to provide recourse to children injured while in state custody or in the care of foster parents. South Carolina is one such state. *See* S.C. Code Ann. § 15-78-70. I run the risk of length in describing its efforts, but that is only to contrast it with the brief and episodic nature of the majority's federal judicial foray. The South Carolina Tort Claims Act (SCTCA) is a comprehensive statutory scheme, which covers a breadth of situations in which an individual might be harmed by a state agency. S.C. Code Ann. § 15-78-10 *et seq.* It exhaustively delineates the circumstances in which a state agency, such as the South Carolina Department of Social Services (SCDSS), *see Joubert v. S.C. Dep't of Soc. Servs.*, 341 S.C. 176 (S.C. App. 2000), may be held liable for torts. Not surprisingly, plaintiffs brought suit under the SCTCA as well as under 42 U.S.C. § 1983.

South Carolina's statute begins with a baseline rule that state agencies may be liable for torts to the same extent as private individuals. S.C. Code Ann. § 15-78-40. It then creates certain exceptions to the general rule, providing immunity in instances where an agency employee exercises discretion. S.C. Code Ann. § 15-78-60(5). The

immunity, however, does not attach where the agency employee is guilty of "gross negligen[ce]." S.C. Code Ann. § 15-78-60(25). The SCTCA then fills in missing pieces with specific provisions addressing, for example, the statute of limitations, S.C. Code Ann. § 15-78-110, appropriate remedies and damages caps, S.C. Code Ann. § 15-78-120, and implications of state liability insurance. S.C. Code Ann. § 15-78-140, -150, -160.

When the South Carolina legislature has not spoken, the South Carolina courts have stepped up interstitially. *See, e.g., City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535 (2009) (discussing proper burden of proof under the SCTCA); *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315 (2002) (discussing meaning of "gross negligen[ce]" under SCTCA); *Jensen v. Anderson County Dep't of Soc. Servs.*, 304 S.C. 195 (1991) (discussing whether SCDSS's decision regarding whether to investigate a report of child abuse was "discretionary"); *Varn v. S.C. Dep't of Highways & Public Transp.*, 311 S.C. 349 (S.C. App. 1993) (per curiam) (discussing whether a court can award costs of litigation under the SCTCA). Moreover, SCDSS has further established an extensive set of policies that touch every aspect of a child's care, developing numerous manuals to steer its many decisions affecting children, biological families, foster families, and adoptive families. *See* SCDSS, Manuals, http://dss.sc.gov/ content/library/manuals/index/aspx. Its manual on "Foster Care," for example, is 180 pages of detailed guidelines regarding such matters as intake procedures, foster children with special needs and health concerns, appropriate levels of

ongoing supervision of children in foster care, and decisions regarding whether and when to remove children from foster care. *See id.*

All in all, the scheme is quite a comprehensive one, making all the more puzzling the majority's intervention in this area. As the majority acknowledges, the South Carolina legislature intended its statute to be "the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a); Maj. Op. at 24. Yet the majority nonetheless provides an additional, federal remedy for torts committed by employees of state government entities. Maj. Op. at 14. The majority does so without ever telling us what deficiency in South Carolina law or practice has led it to intervene with a cause of action all its own. In fact, the majority says that SCDSS employees may be liable when they act with "deliberate indifference" to foster care placements. Maj. Op. at 14. This standard seems a rough approximation of the "gross negligen[ce]" standard, and South Carolina has already acted to deny immunity in cases where agency employees are grossly negligent. S.C. Code Ann. § 15-78-60(25).

Thus, the sole purpose of the majority's cause of action, it would seem, is not to correct any identified deficiencies in state law but simply to allow plaintiffs access to federal courts, where federal judges may fashion over time their separate sets of policies which may converge or diverge from South Carolina's own legal scheme. Moreover, the basis for the intrusion is none other than substantive due process, which unlike its procedural

cousin, limits the range of options available not only to South Carolina but to every state in this circuit in balancing the claims of families, children, and those state agencies charged with protecting their welfare.

To make matters worse, the majority's intrusion is undertaken pursuant to *Pearson v. Callahan*, 129 S.Ct. 808 (2009), which modified the Supreme Court's earlier pronouncements in *Saucier v. Katz*, 533 U.S. 194 (2001), to make unnecessary a federal declaration of rights in cases, such as this one, where qualified immunity is available to state actors and where the declaration can have no conceivable effect on the outcome of the case or controversy. Among its reasons for modifying *Saucier*, the Supreme Court noted that gratuitous proclamations of constitutional rights "may create a risk of bad decisionmaking" and "depart[ ] from the general rule of constitutional avoidance and run[ ] counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Pearson*, 129 S.Ct. at 820, 821 (citations and internal quotations omitted). *Pearson*'s cautionary signals were sent for good reason, namely to deflect advisory and ill-advised judicial ventures into policy, which, with all respect, is what we have here.

In this case, Jane may in fact be entitled to recovery under the South Carolina statute—an issue which appropriately may be litigated in state court. *See* Maj. Op. at 26. And perhaps Jane is not entitled to relief, either because the facts do not develop in Jane's favor or because South Carolina may not allow recovery as a matter of law. But even if Jane

cannot recover under state law—and perhaps especially if Jane cannot recover under state law—this court should not intervene to override that statutory result by allowing her to recover under federal constitutional tort. Any state court outcome may very well reflect a deliberate legislative decision regarding the relative merits of enhanced state liability versus the relative merits of permitting social workers some judgmental latitude in promoting an abused child's welfare and best interest. We should not assume that our federal rule is ipso facto better than the state's or that the South Carolina courts and legislature would gratefully welcome this court's recalibration of the balance they have struck. In fact, in enacting the SCTCA, the South Carolina General Assembly expressly "recognize[d] the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions," and therefore decided upon a system of neither "total immunity" nor "unqualified liability." S.C. Code Ann. § 15-78-20(a).

And if South Carolina is dissatisfied with the result under its statutory scheme, it may craft a new rule going forward. That decision, however, is the prerogative of the state, not this court. As the Supreme Court explained in *DeShaney*:

> "The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system . . . . But they should not have it thrust upon them by

> this Court's expansion of the Due Process Clause of the Fourteenth Amendment."

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203 (1989).

By federalizing the "duty to protect," the majority has effectively scuttled one of the primary benefits of federalism: the tolerance of varied state approaches to our most stubborn social problems. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting). Not only does the majority defeat the benefit of variation but it also incurs the cost of pile-on liability. By imposing a federal constitutional system of liability on top of a state system of liability, the majority has put into place a double whammy of deterrence coupled with a double wringer of litigation; states assuming children's custody will now have to fear no less than *two* liability schemes—one federal, one state—and perhaps, as happened here initially, *two* separate lawsuits—one in federal court, one in state court. And as noted, this dual system of deterrence may work to the detriment of those very persons it was designed to protect—the children whose chances in life depend on being rescued from the ravages of the most dysfunctional environments, even as multiple causes of action now counsel the rescuer to back off.

B.

While state legislatures are the traditional fora for deciding whether to impose a "duty to protect," if the duty absolutely must be federalized, it should be federalized by Congress, not by us.

Congress is the appropriate institution to create any federal "duty to protect," since it can do so by statute rather than by Constitution, which is simply too blunt and rigid a tool for the imposition of general tort liability. If the matter is to be federalized, Congress could readily do so under its spending power, by creating rules for states and conditioning the receipt of federal funds on compliance with those rules. *See South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Congress can hold hearings and consult a wide range of public and expert opinion, thus enabling it to more accurately anticipate a proposed rule's potential consequences and to develop a policy with sufficient nuance to work in diverse factual circumstances. None of these tools did this court have at its disposal.

Legislatures are also comparatively better positioned to monitor the impact of a legal rule, once enacted, and if need be, to adapt the rule in light of changing circumstances or new information. If a law is indeed having a negative effect, legislatures "may recognize degrees of evil and adapt [their] legislation accordingly." *See Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932). For judges, things are different. Because we are insulated from the democratic pulse, we learn of consequences, if at all, by fortuity. Although logic suggests that the majority's opinion will have the unfortunate result of leaving more abused children in the hands of the abusers, the truth is, without any feedback mechanism in place to help us assess our rulemaking, we may never know the extent of the harm caused. And even if we could, the harm could not easily be undone—not by us, bound as we are by precedent, and not by a legislature, since the

majority has rooted its "duty to protect" in the Constitution.

Neither the majority nor the parties point to any instance where Congress has laid down a rule to govern the conduct in this case, and it is wrong for a federal court to rush in where Congress has feared to tread. Additionally, because the textual underpinnings for the majority's duty are unclear, the Constitution supplies this court with very little to direct our task. "[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted).

By basing its newfound duty in the elusive Due Process Clause, the majority has triggered a myriad of issues that this court will eventually have to address, with virtually nothing either to constrain or to guide our task. The majority creates a new substantive due process duty but leaves the rest hanging. What exactly are a state's affirmative obligations? What must it do to seek out information regarding a child's circumstances? How often and how extensive must supervision be? How do limitations periods and tolling principles apply when a foster child raises claims much later in life? From whom and from what must the state protect a child? From which of life's inevitable bumps and a family's inevitable strains and difficulties? These questions

and others have no easy or obvious answers, but by "extend[ing] substantive due process to this area, these questions [will] be before us in short order, and it is hard to imagine what tools federal courts would use to answer them. At the end of the day, there is no reason to suppose that [our] answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite." *Dist. Atty's Office v. Osborne*, 129 S.Ct. 2308, 2323 (2009).

So those who must follow the scarcely formed federal rule are simply left to guess. I suspect that fear of this nebulous liability will produce many instances of excess caution in assuming legal custody of battered children and of excess intervention into new family units. And in the future, when we are forced to further define the contours of the majority's "duty to protect," we will be pushed further into the uncomfortable position of policy maker and will have to, bluntly, make stuff up. It is always tempting, I recognize, to respond to contentions that tug at the heartstrings, but I do not think state courts are cold or callous in a way that we are not, and I do think the states in their judicial and legislative capacities are where the very difficult tensions between familial and communal responsibilities should be resolved. Restraint in the judicial task can be the compassionate course. Allowing Jane to have her day in state court will both respect her individual claims to justice and avoid the heartache that creation of this new constitutional cause of action will involve.

[ENTERED: MARCH 5, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2161
(3:06-cv-03663-JFA)
(3:07-cv-01629-FJA)

JANE DOE, by and through her guardians Gregory and Michelle Johnson; GREGORY JOHNSON; MICHELLE JOHNSON; JOHN AND JANE DOES, #1-10,

Plaintiffs – Appellants

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, SCDSS; DEBBY THOMPSON; ELIZABETH G. PATTERSON, Director; KIM S. AYDLETTE, Director,

Defendants - Appellees

KAMERON SETH COX; TITSA M. FLESCH; HEALTHY MINDS, LLC; JOHN AND JANE ROES, #1-10; MANAGERIAL ROES, #1-10; SUPERVISORY ROES, #1-10; CASEWORKER ROES, #1-10; FOSTER PARENT ROES, #1-10,

Defendants

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed in part and vacated in part. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: APRIL 2, 2010]

Filed: April 2, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2161
(3:06-cv-03663-JFA)
(3:07-cv-01629-FJA [sic])

JANE DOE, by and through her guardians Gregory and Michelle Johnson; GREGORY JOHNSON; MICHELE JOHNSON; JOHN AND JANE DOES, # 1 – 10,

Plaintiffs - Appellants

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, SCDSS; DEBBY THOMPSON; ELIZABETH G. PATTERSON, Director; KIM S. AYDLETTE, Director,

Defendants - Appellees

KAMERON SETH COX; TITSA M. FLESCH; HEALTHY MINDS, LLC; JOHN AND JANE ROES, # 1 – 10; MANAGERIAL ROES, # 1 – 10; SUPERVISORY ROES # 1 – 10; CASEWORKER ROES # 1 – 10, FOSTER PARENT ROES # 1 – 10,

Defendants

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

[ENTERED: SEPTEMBER 26, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Jane Doe, by and through her guardians, Gregory and Michelle Johnson; Gregory and Michelle Johnson; and John and Jane Does #1-10, Plaintiffs, vs. South Carolina Department of Social Services (SCDSS); Kameron Seth Cox; Titsa M. Flesch; Healthy Minds, LLC; Debby Thompson; and John and Jane Roes #1-10 , Defendants.	C/A No. 3:06-3363-JFA **ORDER**
Jane Doe, by and through her guardians, Gregory and Michelle Johnson; Gregory and Michelle Johnson; and John and Jane Does #1-10, Plaintiffs, vs.	C/A No. 3:07-1629-JFA

South Carolina Department of Social Services; Directors Elizabeth G. Patterson, Kim S. Aydlette; Managerial Roes #1-10; Supervisory Roes #1-10; Caseworker Roes #1-10; Foster Parent Roes #1-10.

Defendants.

This matter comes before the court on the following motions: (1) defendants' motion for summary judgment [dkt # 121 in 06-3663 and dkt # 39 in 07-1629]; (2) defendants' motion for sanctions [dkt # 105 in 06-3663 and dkt # 25 in 07-1629]; (3) defendants' motion to disqualify counsel [dkt # 123 in 06-3663 and dkt # 41 in 07-1629]; and (4) plaintiffs' motion for leave to file excess pages [dkt # 131 in 06-3663 and dkt # 51 in 07-1629]. On July 30, 2008, the court heard oral argument on the substantive motions and took the matters under advisement. This order serves to announce and memorialize the court's ruling on the pending motions. For the reasons stated herein, plaintiffs' motion for leave to file excess pages is granted, defendants' motion for summary judgment is granted and the remaining motions are deemed moot.

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well-established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987).*

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Applying this standard to the case, the court finds that summary judgment is appropriate, as discussed herein.

II. Factual and Procedural Background

On August 9, 1999, South Carolina Department of Social Services ("DSS") received allegations of sexual abuse of the minor plaintiff, Jane Doe ("Jane"), and her biological brother,

Kameron Cox ("Kameron"). At that time, Kameron was eight years old and Jane was four and both lived with their birth mother and her boyfriend. The South Carolina Family Court entered a finding of neglect against the children's birth mother and granted DSS custody of both children.

On October 7, 2002, the Family Court terminated the parental rights of the children's birth father and accepted the mother's relinquishment of her parental rights. The Family Court did not make a finding regarding the sexual abuse allegations.

Plaintiffs Gregory and Michelle Johnson submitted in June 2002, an application for adoption to DSS. They checked the boxes indicating that they could not accept a child with sexually aggressive behavior towards children, that they could not accept a child with incest problems, and that they could not accept a child of rape.

Defendant Debby Thompson is the adoption worker assigned to Kameron and Jane. In January 2003, Thompson completed a background summary on both children which was presented to plaintiffs Gregory and Michelle Johnson (the "Johnsons") on January 17, 2003. The Johnson they were given an opportunity to look over the summary and ask questions. They initialed each page of the summary, and on the last page acknowledged that they received the summary and discussed it with Thompson. The background summary explained that there were allegations of sexual abuse, but no such finding was ever made by the Family Court. The summary also explained the different instances of

allegations and suspicions of abuse by and against Kameron, as well as against Jane, and also identified the future therapeutic needs and concerns of both children.

Kameron and Jane met the Johnsons in February 2003, and were placed in the Johnsons' home on March 7, 2003. About March 26, 2003, the Johnsons decided not to pursue the adoption of Kameron. The Johnsons' adoption of Jane was finalized on November 6, 2003 in a Family Court hearing attended by the Johnsons and their counsel, Janet T. Butcher.

The Johnsons report that after adopting Jane, she became more sexually aggressive toward the Johnsons' birth children, with the birth children locking their doors at night for fear of being abused by her. Jane's public behavior also deteriorated into frequent temper tantrums, and the Johnson family had to abate their previous activities and public life for fear of embarrassment and for fear of the safety of others in her presence. The Johnsons claim her behavior eventually led them to place her in an institution for children with emotional problems. As Jane's adoptive parents, the Johnsons are paying for her care.

On January 5, 2006, Kameron pled guilty to sexual abuse of a minor in connection with charges he abused Jane in 2002, while both children were placed in the same foster home. The Johnsons subsequently filed suit to recover for, inter alia, damages to cover the costs of Jane's institutional care, as well as for the costs of her future medical

and emotional care. They also sue on behalf of additional Does who were allegedly abused by Kameron.

Plaintiffs filed their original complaint in this court on December 29, 2006, asserting substantive due process and state law claims. Plaintiffs then filed an amended complaint in this court and a second complaint in state court. Defendants removed the state case, and it was consolidated with the original case under the double caption above. In addition to having an unusual procedural history, the presentation of the claims has been somewhat murky. It appears that the following claims remain:

1. a federal claim under 42 U.S.C. § 1983 against Thompson, alleging that she violated the civil rights and Constitutional rights of the Johnsons, Jane and the additional Does by failing to protect them from abuse and failing to disclose the abuse history of Kameron; and

2. state claims alleging

    a. professional negligence against DSS, Aydlette, Patterson and Thompson;

    b. that DSS, Aydlette, Patterson and Thompson breached their duty to

i. properly supervise employees and contractors of DSS;

ii. properly train employees and contractors of DSS;

iii. provide a safe home for the birth children of the Johnsons as well as the adults in their home;

iv. provide all the materials needed for the Johnsons to make an informed decision regarding their adoption of Doe;

c. that DSS, Aydlette, Patterson and Thompson conspired to hide Kameron's abuse of others; and

d. that DSS, Aydlette, Patterson and Thompson breached their contract with the Johnsons by not providing enough information to the Johnsons.

III. Discussion

A. Plaintiffs Cannot Assert a 42 U.S.C. § 1983 Claim against Aydlette, Patterson and Thompson

Plaintiffs have generally alleged that one or more defendants have violated unspecified constitutional rights of one or more of the plaintiffs, but fail to cite to any authority for legal support.

Plaintiffs cite *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), in which the U.S. Supreme Court states that for

> a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Plaintiffs have presented no authority establishing a constitutional duty of disclosure to prospective adoptive parents. The court can find no such authority, either. Furthermore, even if some authority were to exist for a constitutional right of disclosure in adoption actions, the Johnsons have offered no evidence to support a breach of any such duty. The Johnsons, while represented by adoption counsel, were provided the background summary, each page of which they initialed, and which disclosed allegations of abuse involving Kameron and Jane. The Johnsons' suggestion that they were not provided such information is simply not supported by the record.

Plaintiffs have presented no authority establishing a constitutional right upon which to base their 42 U.S.C. §§ 1983 and 1985 claims on behalf of Jane for injuries inflicted by her brother Kameron while in foster care. There is no duty owed by a state or its agencies to protect an individual

from private violence, as the Supreme Court has held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process clause." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989). The court rejects plaintiffs' attempt to establish a custodial or foster care exception to the *DeShaney* rule.

The Fourth Circuit has considered the constitutional claim of a child injured by his foster parents, and determined that because the foster parents were not state actors, the state department of social services and its employees could not be held liable for the abuse. *Milburn by Milburn v. Anne Arundel County Dept. of Social Services*, 871 F.2d 474 (4th Cir. 1989). Further, the Fourth Circuit has determined that children in foster care have no clearly established right to affirmative state protection. *White by White v. Chambliss*, 112 F.3d 731, 738 (4th Cir. 1997).

The relationship of Jane and the additional Does to Kameron is even further attenuated than the relationships considered in *DeShaney*, *Milburn* and *White*. Those cases all considered parent and guardian relationships, and found that the state had no duty to protect those children. Kameron was not a parent to Jane or the additional Does--he was a sibling. If the abuse of a parent or guardian cannot be considered abuse by a state actor, and thus not subject to a duty of protection, then the actions of a minor sibling cannot be subject to such a duty. As noted in *White*, "[d]omestic violence of all varieties is one of the most wrenching problems that any society

must face, but to federalize the issue through the vehicle of section 1983 is not the answer." Id. at 738.

B. State law claims against Aydlette, Patterson and Thompson must be dismissed pursuant to the South Carolina Tort Claims Act.

Defendants argue that all of plaintiffs' state law claims against the state agency and its officers are subject to dismissal based on sovereign immunity. The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et. seq., constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. S.C. Code Ann. § 15-78-70. Further, the Tort Claims Act requires that the government agency or political subdivision for which the employee was acting be substituted as the party defendant for claims regarding all actions of government employees acting within the course and scope of his employment. *Id.* There is no evidence that any of the actions complained of were outside the course and scope of the employment of the individual defendants. As DSS is already named as a defendant, defendants Aydlette, Patterson and Thompson are entitled to official immunity for acts committed in performing their official functions, and the claims against them must be dismissed. Furthermore, S.C. Code Ann. § 15-78-60 (5) states that the "governmental entity is not liable for a loss resulting from: ... the exercise of discretion or judgement [sic] by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee."

All of the remaining state law claims against defendants DSS, Aydlette, Patterson and Thompson fall within this immunity from liability because of their discretionary nature.

While the court is sympathetic to the plaintiffs for the injuries they have suffered, assuming they could prove their claims, the summary judgment record states no cognizable constitutional or statutory federal or state cause of action against the defendants.

IV. Conclusion

For the foregoing reasons, the court grants plaintiffs' motion for leave to file excess pages [dkt # 131 in 06-3663 and dkt # 51 in 07-1629] and grants defendants' motions for summary judgment [dkt # 121 in 06-3663 and dkt # 39 in 07-1629]. The remaining motions are deemed moot.

IT IS SO ORDERED.

s/Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

September 26, 2008
Columbia, South Carolina

AUG 02 2010

No. 10-30

IN THE
SUPREME COURT OF THE UNITED STATES

JANE DOE, BY AND THROUGH HER GUARDIANS GREGORY AND MICHELLE JOHNSON, ET AL.

Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE PETITION

I. The Fourth Circuit correctly ruled that the Respondent Debby Thompson is entitled to qualified immunity because a foster child's substantive due process rights were not clearly established in the Fourth Circuit at the time Thompson made placement decisions regarding Jane Doe.

In its decision, the Fourth Circuit recognized that a state owes a duty under the Fourteenth Amendment not to make a foster care placement that is deliberately indifferent to a child's right to personal safety and security. However, the Fourth Circuit further ruled that a foster child's substantive due process rights were not clearly established prior to the issuance of its opinion. As a result, the court affirmed summary judgment for the Respondent Debby Thompson based on qualified immunity. The Petitioners seek review in this Court of only that ruling.[1]

The Fourth Circuit explained its rationale in affirming qualified immunity as follows:

> [W]hen the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on

[1] As the Fourth Circuit explained, the only claims that remained on appeal in that court were the substantive due process claims against the Respondent Thompson and the state law gross negligence claim against the South Carolina Department of Social Services (SCDSS). *See, Doe v. South Carolina Dept. of Social Services*, 597 F.3d 163, 168, n.1 (4th Cir. 2010). The Petitioners have now abandoned the claim by the adoptive parents who asserted a substantive due process right to the disclosure of a prospective adoptive child's history of sexual abuse. The Fourth Circuit reversed summary judgment and remanded the state law gross negligence claim, and that ruling is not at issue before this Court.

> fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity.

Doe v. South Carolina Dept. of Social Services, 597 F.3d 163, 177 (4th Cir. 2010).

The Fourth Circuit's analysis is correct and is not deserving of review on certiorari. As the court explains, there is no authority from this Court that specifically recognized a constitutional duty to protect a foster child in 2002 and 2003. The Petitioners cite to this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989); however, in that case this Court "expressed no view" on the issue at the heart of this litigation.

In *DeShaney,* a child was severely injured at the hands of his natural father. The defendant State was aware of the dangers to the child's safety but failed to remove him from his father's custody. This Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197. This Court explained that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. The purpose of the Due Process Clause "was to protect the people from the State, not to

ensure that the State protected them from each other." 489 U.S. at 196. In *DeShaney*, this Court concluded that social workers had no constitutional duty to protect the child against his father's violence.

In *DeShaney*, this Court raised a *possible* distinction where a child is removed by the State and placed in foster care. The Court questioned whether "the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents." 489 U.S. at 201, n.9. Yet, this Court ultimately "expressed no view" on whether foster care was analogous to incarceration or other forms of institutionalization that do give rise to an affirmative duty to protect. *Id.*

Therefore, contrary to the Petitioners' assertions, the *DeShaney* opinion cannot be read as affirmatively recognizing a duty to protect a foster child. Without question, this Court "expressed no view" and did not find that a state and its social workers owe a constitutional duty to protect a foster child from harm within the foster home. [2]

Importantly, that unanswered question from *DeShaney* was the subject of a trilogy of cases in the Fourth Circuit, none of which recognized a affirmative duty to protect foster children.

Beginning with the case of *Milburn v. Anne Arundel County Dept. of Social Services,* 871 F.2d 474 (4th Cir. 1989), the Fourth Circuit considered the constitutional claim of a child injured by his foster parents. The child's biological parents brought suit against the Department of Social Services and several of its employees alleging that they failed to adequately protect the child. The Fourth Circuit

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[2] The Fourth Circuit also recognized that *DeShaney* left this issue unanswered. *Doe*, 597 F.3d at 172 ("The *DeShaney* Court, however, expressly declined to decide the question").

found that the State could not be held liable for the abuse. Citing *DeShaney*, the court explained that the State had no affirmative constitutional duty to protect the child from private violence and further rejected the claim because the foster parents were private actors and not agents of the State. 871 F.2d at 479.

The Fourth Circuit later expanded the *Milburn* ruling in *Weller v. Department of Social Services for City of Baltimore*, 901 F.2d 387 (4th Cir. 1990). In *Weller*, the plaintiff alleged that the State harmed his minor child by failing to protect him from violence at the hands of the child's mother and grandmother. The plaintiff argued that the State created the danger that harmed his minor son because the state intentionally placed the child with these persons. The court found that just as harm suffered by a child at the hands of foster parents is not actionable as a violation of substantive due process, neither is harm inflicted by a parent or grandparent. The transfer of custody does not make the state a guarantor of a child's safety.

Later, the Fourth Circuit decided the case of *White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997). In that case, a minor child was involuntarily removed from the parent's custody and placed in a foster home where she ultimately died from abuse by the foster parents. The plaintiff asserted a substantive due process claim on behalf of a minor child against social workers with SCDSS alleging that the defendants improperly placed the child in a dangerous environment and failed to protect her safety while in foster care. The Fourth Circuit rejected both of these claims.

With respect to the placement claim, the court explained that "[a] negligent placement ... would implicate no federal rights for questions of negligence have long been regarded by the Supreme Court as within the province of state law." 112 F.2d at 737. While the court recognized that some circuits have concluded that deliberate indifference by a

social worker may implicate Fourteenth Amendment protections, the court did not adopt that reasoning. Instead, the court found no evidence of deliberate indifference and did not reach the question of what the clearly established law was on that issue. *Id.*

With respect to the protection claim, the Fourth Circuit definitively held that there was not a clearly established constitutional duty to protect a child from harm in foster care. The court explained that "[g]iven the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of [the child's] death." 112 F.2d at 738. The court thus reversed the district court's denial of qualified immunity for the SCDSS defendants.

Therefore, as the Fourth Circuit recognized, neither the *Milburn*, *Weller*, or *White* cases nor any other precedent clearly established a constitutional duty to protect at the time of the placements of Jane Doe in the present case. Indeed, the opposite was the case. The *Milburn*, *Weller*, and *White* cases explain that there is no constitutional right to protection from harm caused by a non state actor such as another foster child or a family member. It is quite telling that the Petitioners affirmatively requested in their brief to the Fourth Circuit that the decisions in *Milburn*, *Weller*, and *White* be overturned. That represents an acknowledgement that the rights that the Petitioners are asserting were not clearly established in the Fourth Circuit and indeed were contrary to existing precedent in the circuit.

Even more compelling are the decisions by other judges. In granting summary judgment on both prongs of the qualified immunity analysis, the district court ruled that "the Fourth Circuit has determined that children in foster care have no clearly established right to affirmative state protection." (App. 67). The Fourth Circuit subsequently

found that the district court's interpretation of *DeShaney*, *Milburn*, *Weller*, and *White* to be reasonable although ultimately the Fourth Circuit disagreed with that interpretation. *Doe*, 597 F.3d at 176. Moreover and perhaps most importantly, the decision of the Fourth Circuit was not unanimous. The panel found the existence of a constitutional duty to protect only by a 2-1 decision. Judge Wilkinson disagreed "with the view that the Constitution imposes upon states a 'duty to protect' children from harm by non-state actors in foster homes." *Doe*, 597 F.3d at 180. (Wilkinson, J. dissenting) He indeed described the majority opinion as "fashioning" a "new substantive due process right." *Id.*

In *Wilson v. Layne*, 526 U.S. 603 (1999), this Court held that "[i]f judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." 526 U.S. at 618. *See also*, *Pearson v. Callahan*, 129 S.Ct. 808, 823 (2009). Likewise, the Fourth Circuit has held:

> Although there might be instances where a reasonable jurist, but not a reasonable official, would consider particular conduct violative of clearly established law, if a reasonable jurist would not have viewed the defendant's action as violative of clearly established law, then it necessarily follows that the reasonable officer likewise would not have viewed that conduct as violative of clearly established law.

Hogan v. Carter, 85 F.3d 1113, 1116 (4th Cir. 1996). *See also*, *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

Thus, the fact that the district court as well as Judge Wilkinson did not recognize the existence of a constitutional right to protection is sufficient to entitle Debby Thompson to qualified immunity. The simple fact that experienced and accomplished federal jurists do not agree on what the law required is indicative that the law was not clearly established in 2002 and 2003. As this Court explained in *Wilson*, it is unfair to hold government officials liable where jurists cannot even agree as to the legal duties or responsibilities that govern their conduct.

In short, the Fourth Circuit correctly ruled that Thompson is entitled to qualified immunity. That ruling is not novel or unprecedented or controversial. Nor will that ruling have any affect on future cases. From this point forward, the law within the Fourth Circuit is clearly established. Quite simply, the qualified immunity ruling does it warrant the review by this Court on certiorari.

II. The Petitioners' claimed split in the circuits over the substantive due process rights of a foster child is not a proper basis for the issuance of a writ of certiorari where the Petitioners prevailed on this issue in the Circuit Court.

In support of their contention that a writ of certiorari should be issued in this case, the Petitioners argue that there is a split in the circuits as to whether a foster child is entitled to substantive due process protections when placed in an unsafe or harmful foster care environment. The Petitioners point out that a majority of circuits have recognized substantive due process protections for foster children.

Prior to the decision by the Fourth Circuit in the case at bar, the Fourth Circuit had not recognized that a state owed a Fourteenth Amendment duty to protect foster children from harm within a foster home. Indeed, a trilogy of cases, as

discussed above, had been interpreted as rejecting such a claim. However, this is no longer an open or unsettled question in the Fourth Circuit. As the Petitioners fully concede, in the present case, the Fourth Circuit now holds as follows:

> [W]hen a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing "some responsibility for [the child's] safety and general well-being." Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security.

Doe v. South Carolina Dept. of Social Services, 597 F.3d 163, 175 (4th Cir. 2010).

Therefore, while there may still be a minority of circuits that have not expressly recognized a foster child's rights to substantive due process protections, that is no longer a justiciable issue in this case. This case involves the existence of such a legal duty within the Fourth Circuit. The Fourth Circuit now has joined the majority of its sister circuits and recognizes the very duty that that the Petitioners have asserted. This issue was resolved in the Petitioners' favor and is no longer at issue. Hence, the Petitioners cannot claim some split in the circuits as a basis for seeking a writ of certiorari. This case does not present a justiciable claim in that regard.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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